CODE REFORM AND LAW REVISION

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ABOUT THIS SERIES

This study is part of a series of four papers dealing with practical lessons from USAID's experience with justice reform projects in Latin America. These papers are intended to assist with strategic design and, in particular, with the integration of specific activities that most reforms involve. As such, they are directed at reform managers, evaluators, and other participants. The other three papers in this series are: ***Institutional Strengthening and Justice Reform*** (PN-ACD-020), ***Judicial Training and Justice Reform*** (PN-ACD-021), and ***Political Will, Constituency-Building, and Public Support in Rule of Law Programs*** (PN-ACD-023). These documents can be ordered from USAID's Development Experience Clearinghouse (e-mail: docorder@dec.cdie.org or fax: 703/351-4039).

ABOUT THIS PUBLICATION

This paper discusses how code reform and law revision have occupied a major, if initially unanticipated, role in USAID's administration of justice (AOJ) projects in Latin America. Over time, these projects have developed a code-driven reform model. This model's adoption oriented a series of disparate activities and facilitated changes that might have been achieved far less rapidly. Although initially applied to criminal justice systems, the model has been expanded to a variety of other legal areas, including family, commercial, constitutional, and administrative law. To date, its results are mixed. The discussion covers techniques to improve the model and overcome its obstacles. Countries contemplating its use can adopt both positive and negative experience from the Latin American experience.

The views expressed in this document are those of the author and do not necessarily reflect U.S. Government policies. Comments regarding this study should be directed to:

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ABOUT THE DEMOCRACY FELLOWS PROGRAM

Since 1996, USAID's Center for Democracy and Governance has provided funding to World Learning, Inc., to implement the Democracy Fellows Program. To date, Democracy Fellows have been placed in a variety of locations including the U.S., Indonesia, Chile, Eritrea, the Czech Republic, and South Africa. Objectives of the program include (1) providing field experience to individuals committed to careers in international democracy and governance, and (2) promoting the development of democratic institutions and practices in developing countries and transitional or emerging democracies.

SERIES PREFACE

This volume is one of a series dealing with practical lessons derived from USAID's experience with justice reform[1] projects in Latin America. The works were originally called "manuals," but I suspect that is a misleading title. They are not intended as blueprints or guides for designing or implementing projects. They offer some of that, but will be a distinct disappointment to anyone expecting step-by-step instructions for setting up a judicial school or revising a procedural code. I think of them more along the lines of those self-help books, often entitled something like "So you're thinking of (buying a car, becoming a veterinarian, or moving to Alaska)..." As such they begin with basic questions like why one would want to undertake an activity, what objectives have most often been pursued, and what major problems and obstacles most often encountered, and proceed to a discussion of major variations in interventions and their planned and unplanned results. Although the series is organized by types of activities, paralleling those laid out in USAID's strategic paper,[2] a principal theme in all of them is the necessity of embedding each activity in an overall reform strategy. If these works serve no other purpose, they may reverse a recent tendency to think that code reform or judicial training is *the* answer.

The papers' intended audience is project[3] designers, managers, evaluators and other reform participants. They are directed at those with little or no experience in justice reform, but it is hoped they will also be helpful to individuals who have worked in reform projects in one or two countries, or whose participation or background is limited to a more specialized aspect of reform. Justice reform is an expertise learned through experience; there is no single discipline or profession that covers all the angles. Moreover, each legal tradition or individual country always poses new problems and challenges. Undoubtedly some of the generalizations offered here are

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[1]The agency's preferred term for these reforms has changed over time. In Latin America they were called " Administration of Justice" projects. In the early 1990s, the term "Rule of Law" was introduced; more recently, those working in other regions have suggested "legal reform" as a more appropriate title. Although the shifts are intended to denote different emphases, I believe these are vastly overrated. All "justice reforms" target the same set of institutions and utilize similar mechanisms regardless of the specific problem (e.g. increasing access, reducing impunity, curbing human rights violations, or handling commercial disputes more efficiently) addressed. Furthermore, wherever they started, reform objectives have converged over time; Latin American projects which began with criminal justice have expanded into commercial and administrative law, while those in the ENI countries have moved from commercial into criminal areas. Whatever the political utility of the constant relabeling, it has tended to exaggerate methodological and technical differences and discouraged the exchange and accumulation of knowledge.

[2]Blair and Hansen.

[3]Because these are also intended for an audience beyond USAID, I will speak of projects and programs, not results packages and strategic objectives, on the assumption that the former terms are more widely understood.

already being disproved, perhaps even in the countries used as examples. The lessons, it should be stressed, are generalizations. They are not intended to make novices into experts in any of the areas covered, but rather to make them more educated consumers of expertise. USAID staff, and most contracted project managers (myself included) are not expert court administrators, prosecutors, or code drafters. However, they must oversee projects where these and many other expertises must be selected and coordinated. I believe they can only do their job well if they have an understanding of how all the pieces fit together, and the part played and limitations and problems posed by each one. In this sense, project managers are like a motion picture producers; they can't act, direct, do stunts, design costumes, or feed the crew, but they have to ensure that those who can are the best available and that they perform to their maximum abilities without interfering with each other.

As a final note, I would offer a brief explanation of the methodology used. The basic framework is institutional analysis, not as USAID understands it, but as more commonly used in the social sciences. This is an approach where one gets inside an organization (or a project) to understand how and why it functions as it does.[4] Getting inside, it should be stressed, also means understanding the influence of external constraints and pressures, the environment in which the organization operates. Although only one of the papers deals with institutional strengthening, this institutional approach informs all of them. In as much as justice reform or even justice systems are not yet a hot topic for academic research, there is little else in the way of scholarly theory to guide the analysis.

In collecting the data and case studies, I have relied on observation, informant interviews, USAID documents, and general academic studies of justice sectors (but not of their reform). Thanks to a fellowship from the Global Center for Democracy and Governance, I have been able to enrich my own on-the-job experience with field visits to almost every USAID project in Latin America. I have also benefitted from continued contacts with many participants, some of whom also made available their own published and unpublished work. Except for those who probably would prefer to remain anonymous I have tried to cite all contributors in the footnotes. If justice reform is learned on the job, it is also a discipline that requires continual education and evaluation. Many informants have been particularly generous in offering criticisms of their own past work. We are all learning together and I hope that these volumes, rather than being accepted as an attempted

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[4]The term first originated in economics where its proponents offered an alternative to the mainstream "predictive" approaches, emphasizing understanding and "storytelling" instead. Its emphasize on low level generalizations which are difficult if not impossible to falsify made it unpopular there, but in the softer social sciences it may well be the most appropriate approach. See Blaug, pp 126-7 and Mercuro and Medema, Chapter 4 for discussions. More recently, the institutional approach (what Mercuro and Medema call neo-institutionalism) has had a comeback in economics thanks to the work of Douglass North and others. It should be noted that all these approaches differentiate "institutions" (the rules of the game) from organizations (groups of actors pursuing a common objective), a conceptual distinction I flagrantly violate, as does USAID.

final word on the subject, are the beginning of a longer discussion and debate.

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EXECUTIVE SUMMARY

Background: Code reform and law revision have occupied a major, if initially unanticipated role in USAID's Administration of Justice Projects in Latin America. They have been an important tool of reform and have come close to being equated with reform itself. When the AOJ programs began in the early 1980s, its initial supporters deemphasized law revision, fearing a repetition of the failures of the earlier Law and Development movement. Code reform was seen as too central to the common-civil law division and thus a means of forcing an alien legal tradition on the region. However, Latin Americans themselves favored law revision, as essential to introducing change in a system where statutory law has historically been more determinant and as part of a cultural tradition which often equates reform with legal change.

The Model: Over time, Latin American AOJ projects have developed what can be termed a code-driven reform model. It rests on two basic assumptions: first, the conclusion that one of the fundamental causes of poor sectoral performance was the structure of the justice process, and second, that any improvement would necessarily require the rewriting of the basic substantive and procedural codes that shaped it. Analytically the model can be divided into four stages: an initial assessment identifying obstacles posed by existing laws, law drafting itself, law passage, and law implementation. Although initially applied to criminal justice systems, it has more recently been expanded to a variety of other legal areas, including family, commercial, constitutional, and administrative law. The model represents an imperfect marriage between USAID's institutional engineers and the Latin American law writers. The USAID message has been that reform requires both adoption and implementation of laws, and that the process is far from complete when only the first half is accomplished. The message has only been partially absorbed by the Latin Americans who often hew to an older tradition where rewriting legislation becomes a worthwhile end in itself. To some extent the latter view has influenced USAID projects, a development which does not seem positive.

Results: The results of the model's application are mixed. Not surprisingly, most progress has been made in drafting and adopting new codes. Their implementation, however, has been problematic and often chaotic. The most obvious problem is inadequate planning and preparation. From this standpoint, criminal justice may have been an unusually difficult place to start as it requires the coordinated action of a wide variety of institutions. In many cases human rights abuses have been dramatically reduced, but it is not clear whether this is the result of new laws or a number of other related, but still separate events. Promises of greater efficiency and efficacy remain unmet; the first years of implementation often brought increases in case backlogs and coincided with increases in criminal activity. The latter are probably unrelated to the codes but have often been blamed on them. Declines in performance attributable to the new codes may only be the temporary result of institutions' adjusting to new rules and behaviors. However, the codes themselves contain some basic design flaws which will have to be rectified if they are to leverage the desired improvements in performance.

An Imperfect Strategy: Tactically, code-driven reform offers several advantages in the Latin American context. However, political attractiveness is no substitute for strategic soundness. Not unexpectedly, code reform has intrinsic limitations as to what it can change; it is intrasectoral or intra-institutional in its focus and will be of little help if the major obstacles to improved performance are such external factors as political intervention, formal or informal restrictions on institutional powers, or inadequate funding. Assuming that these elements can be attended by other means, and accepting the hypothesis that intrasectoral operations are part of the problem, the question is to what extent new codes will change them. Here the strategy as applied has two principal flaws: its overemphasis on legal change and consequent lack of attention to institutional capacity, and its assumption that its proponents have the knowledge to design better laws. As regards both, it is useful to view a code as one would any development policy and to evaluate it in terms of internal consistency and logic and its adequacy for specific institutional and cultural historical circumstances. To ensure quality in both respects, the strategic model itself requires some alterations.

Recommendations for Improvements:

The reform alliance: The typical reform alliance has been based on a common interest in law revision, but not necessarily on identical objectives or a shared strategic vision. Fortunately, reform is educational for all parties and the areas of agreement can expand over time. Much of this occurs at the working level, percolating up more slowly to institutional and political leaders. It can be aided by a greater effort to identify teams of strategic planners within the affected institutions, reform groups, and private organizations, and to expose them to training, outside consultants, and knowledgeable participants from countries further along in the process.

The assessment: Although most of the AOJ projects did initial assessments, these have not informed the code drafting, which was more commonly based on ideological principles and imported models. Ideally, code reform should not be a foregone conclusion, but rather the result of a prior assessment. Where it seems inevitable, the assessment should focus more specifically on legal obstacles to performance. Whenever and however done, a diagnostic of the legal framework must also include various institutional viewpoints, and incorporate organizational, sociological, financial, and substantive as well as legal experts. Given the costs and delays incurred with massive global assessments, a series of assessments of increasing depth and intensity seems preferable.

Writing new laws: Typically drafting has been done by a small group, all of whom are lawyers, often sharing a common ideological viewpoint. This tends to produce lopsided codes which optimize one set of values or intended impacts while ignoring many others. Although a single drafter may be most practical, this individual should not be the code's owner and should be informed by a wider variety of groups and viewpoints. This is not, however, a support building activity, but rather an informative one. The one caveat is that groups who feel they should participate must be included, or they may become a potent opposing force. Because codes should be drafted with implementation in mind, where consultation does not provide sufficient

information, additional studies or external advisors will have to be incorporated to assess technical and financial feasibility. No code should be released without adequate assessment of its projected costs. An implementation and a transition plan are also essential. If possible, the tendency to put everything into the code should be resisted. Arbitrary decisions as to time limits, minimal staffing, and distribution of offices have often introduced rather than resolved problems.

Getting laws approved: There is a tendency to confuse support building with information gathering and broad public support with that of specialized interest groups. Good laws depend on ample information on public interests, needs and likely reactions; for passage, however, broad public support has rarely been critical. Specialized interests groups or NGOs may help with passage, but they often are a poor source of information on national realities. Implementation requires cooperation from both broad and specialized publics. How the differing roles for and inputs from a variety of publics are best incorporated is probably not susceptible to generalization. The only constant is the inadvisability of automatically subsuming them in one public support building campaign.

Making new laws work: There are few self-implementing laws, and the codes included in the USAID programs are not among them. Preparation begins early by *drafting for implementation*, not solely for ideological and logical consistency. This means writing laws for a specific political, social, and institutional context. However, this context need not remain static, and drafting for implementation includes the development and execution of a plan to prepare the institutional and cultural setting. It also requires a transition plan. Three vital elements are training, institutional strengthening, and public information. The first two elements should begin as early as possible; public information is best done as the law nears entrance into effect. This avoids generating confusion, frustration, and information loss. Involving institutional actors in the public information campaign is highly desirable, but likely to engender their resistance.

Conclusion: Code reform has been an important aspect of USAID's AOJ programs. Its adoption as an organizing theme oriented a series of disparate activities and facilitated changes that might have been achieved far less rapidly. Nonetheless its potential has been inadequately utilized and occasionally overestimated. It is not of itself sufficient to produce change. It often gets the details wrong, and its motivational impacts facilitate but do not substitute for an entire reform program. It does not even begin to address a series of extrasectoral problems also impeding reform. Countries contemplating it as a reform tool, or those considering more targeted legal change, can adopt both positive and negative lessons from the Latin American experience.

INTRODUCTION

Code reform and law revision have occupied a major, if initially unanticipated role in USAID's Administration of Justice Projects in Latin America. They have not only been an important tool of reform but have come close to being equated with reform itself. The purpose of the following is to explore that role, looking at what has been done, why, and with what wider consequences, to the end of deriving lessons for other AOJ and ROL projects.[5]

Code reform, for the purposes of this paper, refers to the rewriting of the lengthy pieces of legislation (codes[6]) the civil law tradition uses to shape substantive and procedural dealings in major legal areas (e.g. criminal law, family law, juvenile law, etc). While the central place of legal codes in the civil tradition, gives code reform a special significance, comparable activities in other less codified systems are possible. Law[7] revision is thus used as a more general term encompassing any rewriting of legislation to modernize, or other wise improve it. It extends from isolated efforts to modify individual laws to full blown code reform, and to any number of intermediate activities -- targeted reforms of codes, revision and rewriting of related laws to eliminate inconsistencies, efforts to compile or codify laws in the common law sense, etc. Law revision in this broadest sense is part of any justice or for that matter developmental reform program. Although the arguments are more broadly applicable, most of the following discussion focuses on statutory laws shaping justice sector performance. In Latin America and other civil law countries, these include both the basic procedural and substantive codes. The former define how a case will be initiated, a trial will be held, or a judgment made (procedural) and how an issue

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[5]These are the acronyms for Administration of Justice and Rule of Law, the two terms USAID uses for its justice reform projects. Administration of Justice is usually reserved for the Latin American programs. USAID introduced Rule of Law as the more inclusive term, encompassing programs with governmental institutions and reforms expanding access to them, advocacy for marginalized groups, and alternative dispute resolution. Although Latin American programs had included many of these elements, *for the agency* AOJ now denotes an emphasis on institution building. To continue the semantic digression, I note that I will refer to "projects"and "programs" instead of USAID's "results packages" and "strategic objectives" on the assumption that the former terms are more universally understood.

[6]These are thus different from codes in the common law sense of collections of laws, usually relating to a single theme, or sometimes all those applicable (e.g. State code) in a single jurisdiction. In the United States, there have been numerous efforts to produce compilations of laws that might be used like European codes. Although statutory law has gradually assumed a much greater importance in this country, such "codes" are used "primarily as references...[with their] interpretation ...left to the judicial and administrative branches." Calvi and Colemna, p. 35.

[7]The term "law" unless otherwise modified refers to statutory law, emanating from a congress, assembly or other legislative body. It thus does not include regulations, judicial precedent, or unwritten norms, any of which may constitute law in its broadest sense.

or crime is defined, what criteria will be used for making decisions, or what sanctions applied (substantive rules).[8] While common law and other traditions leave more of this to internal regulations, judicial interpretation, or custom, their would-be reformers face a similar dilemma. Even where existing practices have other origins, changing how justice is administered and with what consequences may require legal change. The more general theme thus becomes the role of strictly statutory reform and the reorganization of broader legal frameworks to redefine internal procedures and decision-making criteria and thereby improve the functioning of justice systems. While not specifically treated here, it also has implications for the use of legal change to alter non judicial behavior -- that of regulatory agencies or private actors[9]. It may seem self evident that improvements in performance and outputs will require change in operational rules. This quasi-truism is neither as obvious nor as predictable in its consequences as conventional wisdom might dictate. To the extent it does hold, it also raises a series of additional questions as to its most effective realization within justice and related reform programs.

[8]These matters are sometimes affected by other legislation, most notably the constitution and various organic laws defining the internal organization of sector institutions. Code reform inevitably requires their modification as well. This legislation also covers numerous other issues which, while often critical to code reform programs, transcend their specific objectives. The most important of these issues are constitutional and political, defining the inter-institutional distribution of powers -- e.g. who appoints judges and other sector officials, who sets and manages budgets, the existence and extent of judicial review. Although not treated here, these other areas of law revision have suffered some of the same failings and are subject to some of the same recommendations as code reform.

[9]One specific application would be in USAID's new Legal, Institutional, and Regulatory (LIR) initiative, intended to promote commercial activity and economic growth.

THE DEVELOPMENT OF LATIN AMERICA'S CODE-DRIVEN REFORM MODEL

Background

Code reform was a relative latecomer to USAID's Latin American Administration of Justice projects. When the AOJ program was begun in the early 1980s, its authors mentioned the revision of outdated legislation among the activities that might be included.[10] They hardly envisioned the central role that code reform would later hold, becoming the organizing theme and in some cases, the principal indicator of project progress. One reason for this conservative beginning was USAID's experience with the Law and Development movement in the 1970s.[11] The latter had been criticized for, and much of its failure attributed to, its efforts to impose common law practices on civil law countries. The new wave judicial reformers had no desire to fall into the same trap and thus from the beginning emphasized that their program would help local peoples to design and implement their own reform. Rewriting laws, and especially changing basic legal procedures, since they seemed to fall at the crux of the civil/common law division, were thus not designated as areas of great emphasis.

The Latin Americans had other ideas. These arose in the general characteristics of civil law systems[12] and in how Latin America has further developed them. Generally, statutory law has a different place in civil as opposed to common law systems. In orienting both procedural and substantive matters, civil law systems accord a more exclusive role to statutory law.[13] One direct consequence is the greater importance the civil law tradition accords to codification and codes,

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[10]See Alvarez for a discussion of the initial rationale and content of these programs.

[11]The Law and Development Movement is most closely associated with efforts to change legal education and introduce the case study methodology to law school curricula. Rewriting laws was not central to its philosophy, but even after the details were forgotten, the accusations of legal imperialism remained, serving to discourage activities it never contemplated. For a critical discussion of these programs, see Gardner. In retrospect, many observers find the movement's dismissal as a total failure to be overdrawn. One lasting positive impact was in introducing new ideas and a more open-minded, less dogmatic approach to reform possibilities. Participants have collaborated with subsequent justice reform programs, including those sponsored by USAID.

[12]As should already be apparent, discussion focuses on civil and common law systems which share a positivist or secular approach to law making -- law is "made" not revealed, and thus can be changed by a relatively straight-forward process. In legal traditions with a less secular base, law reform may be considerably more difficult.

[13]On the other hand, civil law tradition, and especially the Latin American variations, assign a much greater importance to doctrine, or academic writings. Their recognition as sources of law may help judges fill in or interpret statutes, lending a flexibility that would otherwise not be possible. See Glendon, Zweigert.

lengthy single pieces of legislation, intended to cover all basic contingencies within a specialized legal area. Although common law countries also have "codes", both their content and significance are very different. Common law codes are usually not single laws but rather compilations of legislation. More importantly, they are not written with the same aim of all inclusive coverage and thus are not the exclusive source of legal authority. Civil law countries include in their codes many details that common law countries expect to be settled by less formal intra-institutional decision making, judicial precedent, or custom. Because statutes are the major source of law and practice in the civil tradition, justice reform naturally begins (and occasionally ends) with law revision -- the often incremental change of various origins, more associated with the common law tradition is, at least theoretically, impossible. [14]

Latin America adds its own variations on the theme, arising in the peculiar way the civil law tradition developed in the region. It has been speculated, for example, that one important difference is the greater symbolic as opposed to instrumental function of law in Latin America. It is often observed that while Latin American culture gives great importance to statutory law, this importance does not extend to an expectation that it will shape real behavior. (Popular commentators cite non compliance with traffic laws as the best example, but there are certainly any number of others) Law is taken seriously because it signifies intent, sanctifies values, and may alter the resource base for future political conflicts. Attitudes like this emphasize the importance of legal change while downplaying its immediate real impact. This does not, as elaborated below, exclude the possibility of benefits, some of them quite concrete. It does mean that the short-term enactment of legal "reality" is often not among them.

A second factor is the relative failure of Latin American judiciaries to develop interpretive bodies of jurisprudence to fill the gaps in statutory law. This is the real exception to the ideal rule noted above. Theoretically, civil law judges do not make law; in fact they often have. For example, much of French administrative law is the product of judicial decisions. French judges and legal scholars have developed an entire body of jurisprudence on noncontractual responsibility (torts) based on five articles in the Civil Code. Latin Americans have used some of this to fill in their own legislative gaps, but have generally not attempted or recognized a comparable national tradition. Its absence eliminates a potential source of more evolutionary change and increases the distance between legal and social reality.

A third series of differences arises in the timing of Latin American's civil law inheritance. Latin America received its civil code tradition and codes at the time of its independence, in the early nineteenth century. Since then its legal systems have been cut off from many changes occurring on the continent. A few Latin American countries adopted some later European reforms. None followed continental trends very closely. Peru and Venezuela introduced judicial councils in the

[14]Although the civil tradition's emphasis on a strict division of functions (as opposed to powers) denies judges' ability to make law, as explained below, this "principle" has some very important exceptions.

1960s, Argentina, by way of the province of Cordoba introduced more accusatory[15] criminal procedures in 1939, and various countries created constitutional courts soon after their introduction in Europe in the mid-twentieth century. More generally, however, Latin America has passed its nearly two centuries of isolation evolving its own version of the civil code tradition. In criminal procedures this meant a much reduced role for the Public Ministry (prosecution) which in some countries (Peru in the mid-1970s, Uruguay) completely disappeared and in most was the fifth wheel or *convidado de piedra* (mute guest) at the criminal trial. Many countries did not develop a special investigative police, and where they did, it usually was not under judicial control or supervision. Less formal variations include a widespread tendency to delegate judicial functions to administrative staff, to reduce judicial investigation to a desk review of the police report, and to make oral hearings little more than ritualized readings of the written case file (*expediente*). Many of the abuses associated with the inquisitorial system were taken to exaggerated extremes in Latin America. Excessive pretrial detention remains common in Latin American, for example, where pretrial detainees represent up to 90 percent of prisoners, some of whom may never have been brought before a judge. Until recent reforms (1994) the French rate was 40 percent; police could hold someone for up to twenty-four hours without showing cause. This might be done simply to attain information.[16]

Patterns of political development in the region added still more vices. Extreme socioeconomic inequality has meant that both the protections and abuses of its justice systems have been very unevenly distributed among class, ethnic, gender, and geographic groups. The growth of mass-based parties in the mid-twentieth century had the unfortunate consequence of increasing political intervention and patronage in judicial appointments at a time that Europe was seeking to further professionalize its judiciaries. Moreover, a tradition of poorly paid and thus corruption-dependent public servants did not skip the justice sector. Ill trained judges and other sector officials usually lacked the skills and equipment to do an adequate job whatever their personal inclinations. Thus not only did Latin America miss some of the modernizing and reformist trends of the continental system; it also developed its own idiosyncratic weaknesses.

When reformist impulses did reach Latin America they tended to do so as regional movements, often following earlier European developments.. The most recent of these began in the 1960s. As often before,[17] the major emphasis was on rewriting legal codes, to modernize the content and

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[15]I will use accusatory and adversarial interchangeably in the context of criminal procedures, despite a sometimes heated debate among early readers as to which is preferred.

[16]Jacob, p. 210-11. Recent newspaper reports indicate that in contemporary Italy, 50 percent of detainees are unsentenced.

[17]Latin America has experienced several eras of reform through code modernization. Many countries rewrote their basic criminal and civil codes in the 1930s and 1940s. Often European influence on code writing was transmitted through a single Latin American country, the first to undertake a modernization. Thus Chile's civil code from the end of the nineteenth century was

structure of criminal and civil proceedings. Distinguished jurists from a number of the region's countries had been involved in writing model codes, whose partial adoption had been accomplished in a few countries.[18] When the U.S. government began its AOJ programs, it was unaware of the history or extent of this movement. Central America, where the early regional and bilateral programs began, was, with the exception of Costa Rica, far behind the regional curve. It thus took time for the local and foreign proponents of reform to find each other and forge an alliance. When they did, this broadened both parties' perceptions of the problem to be resolved and the types of solutions available.

The USAID contribution was its emphasis on training, administrative and management technologies, and general institutional strengthening, activities which were part of its usual repertoire for any development program. On the Latin American side was law revision, usually a minor part of development assistance, and as noted, one which had appeared almost off limits because of presumed cultural sensitivities. Coincidentally, some of the changes promoted by local reformers seemed to introduce elements of the U.S. legal tradition -- oral trials, more accusatorial procedures, constitutional judicial review. Thus, despite the USAID reformers' resolve not to force elements of an alien system, they found their regional allies prepared to do so. The provenance of these trends was not, however, direct imitation of U.S. practices but rather adoption of earlier European developments. Later critics and proponents of reform often ignore this historical detail, the former returning to complaints of legal imperialism, the latter assuming that the point is to reproduce more Americanized systems. It is worth reminding both that the replication is highly selective and indigenously directed. While local reformers have been willing to adopt some practices directly from the U.S. they never intended wholesale imitation. This is apparent from reading the laws they have promoted and their explanations for how they are supposed to work.[19]

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copied throughout the region, just as Cordoba's criminal procedures code (from 1939) became the model for the current code reform efforts.

[18]See Llobet for a discussion of the model code movement. Nemoga Soto also discusses some of the early history in Colombia, and especially reform efforts beginning in the early 1960s.

[19]Most often European examples are cited, with Spain, Germany, and Italy being favorite choices. The Bolivian proposal to introduce "mixed" juries (part lay and part judicial) is said to follow Swiss practices. See articles in Maier and Vargas for a brief discussion of European influences and models.

The Latin American Model

Although a latecomer to USAID's AOJ programs, code revision is now an intrinsic part of what can be termed a Latin American model of justice reform. The earliest USAID projects (El Salvador and the rest of Central America), while emphasizing human rights and criminal justice, focused on a variety of discrete activities, aimed at resolving whatever local complaints or a formal assessment identified as important problems. For example, the observation that in El Salvador many high profile crimes went unpunished because of the responsible authorities' inability or unwillingness to identify suspects led to an effort to eliminate presumed impediments to effective investigation. Activities included the establishment of a forensics laboratory, a judicial protection unit, and a special investigative division within the national police. In other countries, complaints that inadequately trained judges misapplied laws or were more susceptible to external pressures inspired judicial schools or training programs (Costa Rica, Honduras, Panama and Guatemala). Assessments which described antiquated or inadequate administrative and management practices produced programs to improve both (Honduras).

Contact among national projects and the use of the same consultants for the initial assessments[20] encouraged similar designs and activities. Meanwhile, greater familiarity with the local systems substantially increased the possibilities for action without providing much of a strategic handle on the task. Whereas the initial justification mentioned a dozen "problems" to be resolved, there were now ten times that many and an equivalent number of possibilities for organizing programs. Success in producing overall improvements, however, was proving elusive. In some cases (El Salvador's forensics lab, investigative police, and judicial protection unit) the initial interventions failed to take hold, suggesting a more fundamental, but undiagnosed cause. In others (Guatemala's computerized information systems, various judicial schools), while the intervention appeared to succeed for a while, it seemed unlikely to leverage wider change.

The failure of these programs to produce change either on their own terms or as wider system impact led to redesign efforts and the early termination of at least one project (Guatemala). More gradually, it produced a new consensus, based on the alliance between USAID's projects and the local reformers. The consensus featured two working hypotheses: first, the conclusion that one of the fundamental causes of poor sectoral performance was the structure of the (criminal)[21] justice process and second, that any improvement would necessarily require the rewriting of the basic substantive and procedural codes which shaped it. The consensus did not discount the potential value of the earlier activities, nor did it deny the importance of complementary measures aimed at

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[20]The first series of assessment were conducted as a joint project by Florida International University and ILANUD (the United Nations Latin American Institute for Crime Prevention and Treatment of the Delinquent). Several have been published separately. See works by Rico, Salas and Rico, Solis and Wilson.

[21]Similar conclusions were reached vis a vis other legal areas, but criminal justice remained the major concern in most projects.

reducing political intervention and increasing the functional independence of the judiciary and other sectoral institutions. It did emphasize that absent a reformed legal framework, their impact would remain minimal.

Although the model code movement emphasized civil as well as criminal justice, and has since been extended to include civil, constitutional, administrative, family, juvenile, and commercial themes, most of USAID's projects have focused on criminal law. They have prioritized the rewriting of criminal procedures codes, substantive criminal law, and related legislation modifying organizational, procedural and substantive matters. In this, the marriage between USAID's institutional engineers and the Latin American law writers remains imperfect. Whereas USAID's support to the rewriting of criminal legislation encouraged Latin American resolve to revise more laws in other areas, the USAID projects attempted to use law reform as an incentive and first step toward the introduction of other forms of change in the criminal justice systems. The USAID message has thus been that reform requires both adoption and implementation of laws, and that the process is far from complete when only the first half had been accomplished. The message has been only partially absorbed by the agency's local partners who often hew to an older tradition where rewriting legislation becomes a worthwhile end in itself.

The influence has not been entirely unilateral. Over time, many USAID reformers have been sufficiently converted to code revision as to appear unwilling to recognize reform without legal change. This raises a question as to whether code reform is only a tool to leverage more fundamental change, or whether it is one of the benchmarks against which reform's success should be measured. USAID has never gone so far as to equate justice reform with code revision. However, in some projects (e.g. El Salvador) where "preparatory" activities progressed significantly, USAID seemed to discount what were arguably real improvements in system performance absent the approval of a code.[22] More recently, it has also been willing to support code reform as a stand-alone activity.

Whether seen as a necessary or simply complementary condition for improved performance, code reform has emerged as the organizing theme for USAID's programs in the region. Although much remains to be done in criminal justice, the agency, its local allies, and other donors are already anticipating similar programs in such areas as commercial, family, juvenile, agricultural, and administrative law. In their design, these programs tend to follow a four-step process or model. As summarized here, and discussed in greater detail below, the model is an idealized representation. Its neat separation and sequencing of the steps is fairly illusory. Even where programs included all four stages, local conditions might dictate a different ordering or a less than clear division among them. Where the order and number of stages were preserved, some appeared to have little more than a ritualistic role. It has been argued that a more authentic duplication of the model would have produced better results more quickly. However, the apparent success of some less than faithful replications also suggests room for variation. The

[22]In El Salvador, the codes were initially scheduled for approval in early 1994. They were finally passed by the Assembly at the end of 1996 and will enter effect in early 1998.

model may represent the best approximation of the logical elements of a reform process, but in the real world of reform politics, technical logic is rarely the sole driving force.

In the model's ideal world, the first step is to identify and prioritize the concrete problems in sector performance, recommend solutions, and develop an overall strategy for their realization. Theoretically, this precedes a decision to undertake code reform and requires some kind of global assessment. In Latin America, the earliest assessments did break new ground in exploring and explaining the dysfunctionality of the criminal justice systems. Running to hundreds of pages they identified a comparable number of discrete problems. Even the general listing was extensive, extending from corruption and politicization of operations through ineptitude, inefficiency and inefficacy, to irrational administrative and judicial procedures. Although not all of these problems were susceptible to law reform, in a civil law tradition, many of them would require legal change as a prelude to their resolution. Thus, code reform became the common denominator for attacking the greatest number of problems.

It would be stretching the point to suggest that the code-driven strategy was the result of dispassionate and objective analysis. As indicated above, the preferences of local reformers, and increasingly of USAID participants, lent a strong element of foregone conclusion to its selection. Moreover, because of their global focus, the Latin American assessments provided a summary overview rather than an exhaustive examination of problems originating in legislation. Nonetheless, they have been a useful source of baseline data and of information to guide implementation. Despite a tendency to leap directly into code drafting in noncriminal areas, they will be still more necessary there. Short-circuiting the assessment stage appears to save money and time. It also produces codes in an informational vacuum, operating on the highly dubious assumptions that anything new is better than what already exists, that there are generic solutions to country-specific problems, and that reality will follow law.

The second step is the drafting of new legislation to address the problems identified in the assessment. The process is oriented by the general objectives and strategies determined in the prior stage, but inevitably requires additional information. Here too, practice deviated from theory; the perceptions and recommendations behind the new legislation, like the choice of a code driven strategy, were based as much in legal doctrine as in real observations or empirically tested remedies. The reform legislation is so similar from country to country that it arguably could have been written without the individual assessments; there is little sign that those drafting the codes utilized them or that they sought other means to augment their understanding of the local situation. One can certainly question many of the assumptions informing this second stage -- ranging from the inherent inferiority of the inquisitorial system, to the notion that more due process guarantees would increase efficacy as well as reducing abuses. Although presented as axiomatic, most of these assumptions should be regarded as working hypotheses for empirical testing and possible modification should they not produce the predicted results.

The third part of the process is the approval of the legislation and its passage into effect. Where the reform alliance included members of government, this often followed so quickly after the

drafting as to hardly merit consideration as a separate stage. In other cases it has been long and arduous, merging with or even following the fourth step. This is the most varied and least systematically developed part of the model. It has sometimes involved extensive consultation and revision of the initial draft codes. It has also been organized as a strictly informational and promotional campaign, where the point is not to invite revision, but to convince potential opponents or supporters of the value of the new law. In a few cases, this stage has included analytic studies of the implications of the new legislation, not so much for promotional purposes as to identify the needs for implementation. Obviously, a part of the variation is a function of the different political situations facing the reformers. However, it is not evident that the strategies they evolved were always the most appropriate for their specific circumstances.

The fourth part is a three-pronged program of:

> judicial training aimed at teaching the "system operators" their new roles and required skills,
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> institutional restructuring and strengthening to reorient, reorganize or create institutions to implement the new codes, and
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> public information and education aimed both at the wider legal community and the general public.

In the earliest days of the code-driven projects, there activities often appeared as mere afterthoughts. El Salvador's project agreement thus gives legal reform equal weight and a more detailed definition than it does those activities intended to "prepare institutions to implement the new codes." As time went on, it became obvious that absent these steps the reformed codes will be born dead letters. Thus, more effort and resources were devoted to them.

For many participants, the second and third steps remain the essence of reform; the rest is just details. Conversely, for those not convinced of the independent value of law revision, the drafting, polishing, and passage of a new code, are little more than a pretext for undertaking the real change, that encompassed in institutional restructuring, training, and public information and education. Some early proponents of law revision have reached this conclusion, arguing that many changes could be produced under existing legislation, and that code revision has absorbed too many resources. They base this argument on analysis of existing laws and on the observation that the "preparatory" training and institutional strengthening has often caused organizations to operate differently, more effectively, and efficiently, even before new legislation entered effect. Other observers signal the need for more efforts to build political will, constituencies, and public support for approval of the new laws. They charge that the failure to enact or enforce legislation can be attributed to the inadequate or ineffective organization of these activities. All these arguments are discussed below. For the moment, it is worth noting that although the elements of the model have been set out to everyone's satisfaction, there is still considerable debate over the relative importance (and resources) to be assigned to each one, and in some cases (most notably

the political elements) over the most effective organization of the work itself.

Despite the lack of consensus on its relative importance, over time more effort has gone to preparing institutions for implementation. If the USAID reformers have been politically successful in one regard it has been in convincing their allies that this is as necessary as writing the new criminal codes. The lesson has not been as effectively transmitted to other legal areas where there is a disturbing recent tendency to refocus efforts on producing laws . For the criminal codes at least, the general argument has been aided by some spectacular negative cases. The most notable of these is Guatemala, which in the two years (1992-1994) between the passage and entrance into effect of its new criminal procedures code, did little or no preparation. When the code took force, the country's criminal justice system was plunged into near chaos. Even three years later, it is still far from where the code's proponents had intended it to be. Guatemala is the "best" worst practices scenario; there are many other examples. These include Costa Rica with its Civil Procedures Code (1990), Salvador with its Family and Juvenile laws (passed into effect within a year of each other and with six months and 18 months preparation time, respectively), or Nicaragua with its partial criminal procedures reform (reintroducing juries) of the early 1990s.

Results

It is still too early to evaluate the model's success. Efforts are complicated by lingering disagreements on its precise objectives and the substantial variations in its application. On the not entirely unanimous assumption that success is measured not only in the adoption and implementation of new procedures, but against improvements in such factors as the extent of impunity and human rights abuses, efficacy, efficiency, availability of services, and "customer" satisfaction, its achievements must be examined at these various levels.

As should already be apparent, the results to date are mixed. Not surprisingly, most progress has been made in the drafting and adoption of new codes.[23] Colombia, Guatemala, Argentina, Uruguay, Peru, Costa Rica, and El Salvador have approved new criminal and/or civil procedural codes and in some cases have added new procedural codes in other areas (most notably family and juvenile law). Numerous other countries have draft codes under discussion. Panama and Nicaragua, while not adopting new versions, have made partial revisions in their existing criminal procedures codes. New substantive codes have been approved by these and other countries, but of themselves imply less change in system operations. In most, but not all of these countries, the codes are now in effect. Progress has been slower in adopting enabling legislation -- laws creating new institutions, reorganizing those already in existence, or addressing other details. Peru, it should be noted, suspended enactment of its criminal procedures code and has a new version under study.

As should also be apparent, enactment of the codes has usually been problematic and often

[23]See Vargas for a relatively up-to-date list.

chaotic. In some cases (Costa Rica and Peru's civil procedures codes[24]), observers cite few real changes in practice, even after several years. In most, efforts to enforce the new legal frameworks (often delayed even beyond the date the laws enter effect), have produced considerable confusion and often resulted in partial implementation at best. The most obvious cause is inadequate planning and preparation. The one country not experiencing these problems, Uruguay, is the only one to have developed both an implementation and transition plan to guide the code's enactment. Uruguay's success has also drawn the observation[25] that this kind of change is most easily initiated in civil procedures as it does not require the coordination or the creation of so many different entities. However, most countries have preferred to begin with their criminal justice systems because they have occasioned the most dramatic abuses and provoked the most fundamental criticisms. Furthermore, while civil *procedures* may be changed with less disruption, it is not evident that this generalization extends to new substantive codes and laws, and especially those in more specialized areas (commerce, inheritance, land tenure). Arguably, this reverses the situation in criminal justice where changes in substantive laws (definition of crimes and penalties) generated relatively less controversy because they affected fewer extra-sectoral interests. Although El Salvador's family legislation introduced new and imperfectly implemented procedures, most opposition was directed to certain substantive provisions -- especially those defining parental responsibilities for children born out of wedlock.

The partial and imperfect implementation of the codes frustrates attempts to assess their real or potential impact on sectoral performance. At most observers have been able to document a one-dimensional change in usually multi-dimensional goals. Even here, causal linkages are rarely clear-cut. Uruguay, the only country for which systematic studies exist, has experienced a significant reduction in delays in processing civil cases. As Uruguay accompanied its adoption of the code with a substantial increase in the number of judges, isolating the code's effect has been difficult.[26] Efforts to trace the impact of new criminal procedures are still less conclusive. They usually focus on human rights abuses and productivity, and are fraught with similar methodological difficulties -- separating the codes' impact from that of other interventions, or controlling for such exogenous factors as changes in patterns of criminal activity.

The adoption of new criminal codes often coincided with such major political events as the end of an internal war, the creation of external monitoring agencies, and the civilianization of police forces. Thus reductions in serious human rights abuses may have other explanations. The adoption and implementation of new legislation may have more direct impact on the frequently increased respect for certain due process guarantees. However, positive changes have also been observed where codes have not yet been approved. These are attributable to preparatory training

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[24]Neither of these were donor sponsored.

[25]Vargas, p. 71.

[26]See Gregorio (1995 and 1996) who detects an independent impact from the code. Vargas also makes this argument relying on studies by Gregorio and others.

which also stresses existing, but widely disregarded legal rights. Measurement of efficiency or productivity (e.g. number of cases processed, reduction in time to disposition) is complicated by inadequate baseline data and major fluctuations in demand. Immediate results have not been positive, indicating slight[27] to massive increases in case backlogs and in processing times. Problems include the difficulties of adjusting to new practices, and a tendency to produce bottlenecks as responsibilities are shifted among institutions and institutional actors. Many of these constraints will disappear with time; they could also be avoided with better planning and implementation. Still, the promised greater efficiency remains an issue.

The ultimate tests, however, are changes in elements that are still harder to define let alone document, and which will inevitably take longer to realize. These have to do with the quality of justice, the adequate as opposed to timely disposition of cases, and in criminal justice, the ability to identify and prosecute the guilty without violating their rights or those of the innocent. Given where most countries started, the learning curve will be both very steep and very long. An occasional step backwards may be unavoidable. For just these reasons, and because of the large investments of human and financial resources, some ability to predict impact is essential. This is important for countries which have already embarked on a code-driven strategy, so that they may make any necessary adjustments. It is still more essential for those that have not, so they can avoid any more fundamental errors.

To anticipate the further discussion, one conclusion is apparent. A code-driven strategy can work, but only with the right code, and of course, with adequate planning and implementation. Experience with the criminal procedures codes in particular indicates some basic flaws which will have to be rectified if they are to leverage the desired improvements in performance. The codes have complicated their own implementation, in part because they were not drafted with implementation in mind. Beyond this, they are also inadequate and occasionally inappropriate guides for action, two dimensional codes in a three-dimensional world. This latter kind of error can be addressed after the fact by further amendments to laws already approved. Countries in this situation are making these adjustments and are a rich source of ideas in this regard. However, the more interesting lessons address the way the strategic approach and model have encouraged errors of both types and how they might be modified to avoid them. The rest of this discussion takes a closer look at these issues and at the overall utility of code-driven reform.

[27]See Vargas for the Argentine case, where documented changes are slight but negative. The backlogs in Colombia and Guatemala while less adequately documented, are far greater.

THE STRATEGIC AND TACTICAL BASES FOR CODE-DRIVEN REFORM

Does code reform make sense as a means to organize efforts to improve sectoral performance? There certainly are alternatives. In Latin America and elsewhere, one traditional if rarely effective option has been to replace the judges and other sector personnel. Another is to make institutions work to existing laws; this route may be followed in Haiti and the Dominican Republic at least over the medium run. Despite reservations about the legal framework, the underlying argument is that its enactment would constitute a distinct improvement over informal practices. Panama, while possibly preferring integral reform, settled for partial revisions of existing laws to resolve very specific weaknesses. This was later combined with an institutional strengthening program focused on the Public Ministry and the investigative roles of the prosecutors and police. Contemporary Peru has downplayed further code reform in favor of a modernization strategy based on administrative and procedural rationalization, the use of information technologies, and the proposed replacement of most administrative personnel.[28] Peru's strategy has not increased, but most probably reduced judicial independence. For others the crux of reform is increasing independence to give the sector's institutions greater freedom of operation. The differences of means chosen and objectives pursued are often of degree. Most alternatives require some legal change, but it follows rather than drives strategic choices.

These choices are never entirely technical. The cultural, political, and historical setting shape the definition of the problem and the identification and feasibility of solutions. They may be strong enough to force or preclude certain courses of action. Thus, while the answer to the question is partly based on the strategy's objective potential, it also is determined by the context in which it will be applied. There are problems and contexts where code reform is not an appropriate choice, there are others where it will be selected regardless of the theoretical alternatives. To help distinguish these situations and identify the intrinsic and contextual limitations on the its impact, the present section reexamines the underlying strategy and its Latin American development.

The Implicit Limits of Code Reform

Code reform is inherently intra-sectoral or intra-institutional in its focus. It does not, except indirectly, operate on the linkages between the sector and the wider political system. The best operational rules will not improve performance if external factors force their violation or otherwise impede compliance. Inadequately paid and equipped personnel, appointment systems which ignore merit in favor of personal or political connections, extralegal external intervention in functional and administrative decisions, or laws which otherwise restrict institutions' ability to operate -- all of these will obstruct the code reformers' efforts, and most depend on factors beyond the control of codes, or of the organizations that will apply them. These considerations do not invalidate the code-driven strategy. They do call attention to its inherent limitations absent other changes. Most of these changes involve political decisions donor assistance programs can

[28]It is rumored that a replacement of judicial professionals may also be contemplated, following on an initial partial purge which preceded the current reform.

encourage or facilitate, but which also exceed their direct control.

To be fair, most of the code reformers have recognized this limitation, occasionally attempting to address it through related programs of legal change. These often involve constitutional amendments to increase judicial budgets (usually with an earmarked percentage of the national budget), change appointment systems to remove the most blatant forms of political interference, and otherwise protect sectoral institutions, and the courts in particular, from external control. As in the case of code reform itself, a reliance on legal change and the specific changes recommended have produced unanticipated and frequently disappointing results.

Two companion studies, one on support and constituency building, and the other on institutional strengthening, examine some of the political and technical aspects of extra-sectoral change. The present discussion will not deal with them directly, except to note that they pose a critical conditionality for the success of any intra-sectoral reform and that in some situations these external changes may be far more important than anything code reform can do. In most Latin American countries, reforms are needed at both levels. Thus, while recognizing their importance, this treatment will "assume the resolution" of extra-sectoral obstacles, limiting its focus to the utility of code reform as an independent source of change. In the end, just as code reform is constrained by the political environment, few would argue that getting the political relationships right is all that is required to improve sectoral failings.

Why Code Reform? A Tactical Analysis

Whatever its other shortcomings, code reform has been a convenient theme around which to organize support for Latin American justice reform programs. It offered immediate allies in the form of an existing movement and it appealed to traditional understandings of how legal systems should be changed. It was more broadly focused than prior efforts to resolve discrete problems, but at the same time allowed their inclusion in an overall strategy. Code reform also provided a way to attack problems without attacking individuals, and to articulate these attacks as positive rather than negative actions. In this sense, it represented a partial solution to an essential dilemma of justice reform in Latin America: how to induce intra-institutional change without increasing external dependence or aggravating internal conflicts. The solution is far from perfect, but it has allowed sectoral institutions or at least some of their members to take a proactive stance toward reform, and encouraged others to view change less as a threat than as a chance to do better. The impact is evident in many training programs whose graduates demonstrate an almost religious attachment to the new principles and come to describe themselves as agents of change.[29]

Code reform has also been a way of introducing fundamental changes incrementally and of

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[29]There is an interesting contrast with reactions reported in Peru in the late 1970s when a military-imposed reform featured attacks on the "antirevolutionary" judges. Studies done at that time indicated that many judges had absorbed the message, but that the consequence was a decline in morale and a tendency to see themselves as powerless victims. See Ciudad and Zarzar.

attracting supporters who begin with more limited objectives. As discussed above, the initial code reform movement derived from a belief that changing laws is the essence of reform. Many, but not all Latin American reformers have shifted to more complex definitions of reform and appreciations of how it is achieved. Where potential allies hold this more limited view, there are initial advantages. A faith in the efficacy of legal change can start the process and generate more enthusiasm than might be a possible with a realistic appraisal of what will be a needed. USAID participants often shared this false optimism, if more as a function of underestimating the difficulties of the accompanying changes than of overestimating the benefits of rewriting laws. Over the longer run the belief in the sufficiency of code reform is a decided disadvantage. It discourages efforts to effect other kinds of change -- either because they are perceived as unnecessary or conversely, because it is assumed that they are not yet possible. When El Salvador's new Family Code was promulgated in 1994, some of its supporters in the judiciary expressed faith that within twenty years, the country might prove capable of implementing it.[30]

Tactical alliances also attract members whose interests are further removed from the presumed larger goals. In Latin America, political and institutional leaders occasionally proposed law revision as an alternative to more difficult if potentially more productive activities.[31] They saw it as inherently harmless, a not unreasonable view based on past history. They have sometimes been unpleasantly surprised when implementation is forced or proves easier than anticipated. In other cases, this course of least resistance turned out exactly as expected.

For others the symbolic importance ascribed to law made introducing a new code a sufficient victory in itself. They may not oppose change, but believe it impossible -- thus they are content with a "progressive" code as a declaration of intent. This is hardly a uniquely Latin American position. Commercial law programs in other regions have occasionally promoted "advanced" legislation where institutional weaknesses make its effective enactment highly improbable. Human rights activists promote formal adherence to covenants and treaties which are unlikely to be a enforced for years. Among the arguments advanced in both cases is that getting a law on the books will set a positive example or give an edge for future struggle, even if the latter will not begin, let alone be a won for years. The strategy is not unreasonable. It does contain an implied trade-off -- maximizing a symbolic improvement against effecting a less ambitious real one. Moreover, it can have negative consequences. Passage of an obviously unrealistic law can reinforce perceptions that laws are not intended for implementation. Efforts to implement it can produce still less desirable results, possibly contradicting the law's intent.[32]

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[30]Interviews, El Salvador, 1994.

[31]In El Salvador as the governing party entertained some second thoughts about the new criminal codes and the institutional changes they would require, one highly placed leader openly suggested redirecting efforts to writing new laws in other legal areas.

[32]This argument underlies much criticism of efforts to regulate private sector activity in Latin America and elsewhere and is a frequent explanation for the emergence of a large informal

Other allies, whatever their interest in reform, have additional personal and political agendas. The passage of a progressive code is a personal victory for its official sponsor. Sadly, this often leads to restricting participation in the drafting process and so generates new sources of opposition from those excluded. Authorship or sponsorship may also be a resource for the political advancement of an individual or party. Some "progressive" codes received high level backing as part of a political strategy which sometimes featured access to donor resources for partisan as well as programmatic ends. Throughout Latin America, code reform has found allies whose past history or presumed ideological leanings hardly seem consistent with support for these policies. Whether acting independently or in coordination with donor projects, they have proved critical in moving programs ahead. This was the case in El Salvador from the late 1980s, Bolivia in the 1990s, and Colombia in the early 1990s. For these allies the emphasis on codes has a further tactical side. As opposed to other reform activities, it produces a visible, fairly indisputable result in a relatively short time, and one whose achievement is more easily attributed to a single individual or faction.[33]

The mixed benefits of such high level support are indicative of the limits of tactical coalitions and the explanatory power of concepts like "political will."[34] This support can complicate alliance building with groups of other political or ideological persuasions. It can also direct resources to blatantly partisan ends or away from politically sensitive ones which are critical to resolving high priority problems. Allies from within the political establishment may be reluctant to introduce further changes reducing their control over key institutions or to take on the interests vested within them. Since code reform, of itself, rarely poses this threat, "political will" may be a strongest there but begin to weaken at the stage of implementation. In short, tactical alliances can encourage adoption of a strategy, but can also distort its development. In any case, popularity does not guarantee validity; this must be evaluated separately.

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economy, existing outside the laws with which it is unable to comply.

[33]It is an observable fact in Latin America that individuals who have advanced major institutional reforms rarely get the credit whereas laws are often associated with their authors.

[34]Political will has become a sort of residual explanation for reform failure, but is rarely defined at an operative level. See Blair and Hansen. Vargas does note its multi-dimensional sources and targets, but does not suggest how it can be identified, except in its absence.

Why Code Reform? A Strategic Analysis

Presumably, code reform is selected not because it encompasses a variety of interests, but because of its strategic linkage to improving sectoral performance. In Latin American, the code-driven approach really subsumes two strategies. They are united through the fundamental argument that many of the recognized flaws of any justice system cannot be eradicated without legal change -- either because they originate in the legal structure or because, however they originate, existing legislation facilitates, encourages, or permits them. These two explanations define substrategies which differ in their methodologies and programmatic implications.

The first, *structuralist*, position identifies more fundamental problems in the existing legal systems, and in the case of Latin America in the inquisitorial criminal process. (Those promoting code reform in other legal areas have made comparable arguments, although they are usually not as well developed). Although the structuralists have moved beyond the original code reform movement in recognizing that additional actions are needed,[35] they commonly argue that nothing short of global law revision will provide sufficient reorientation for real improvement. For them, the system's failures are visible not only in its outputs, but in its fundamental structure and often, in the philosophical and ideological assumptions determining its operations. This belief in the structural weakness of the existing legal tradition is echoed in USAID's efforts to condition reform assistance as much on the passage of basic codes introducing orality and adversarial systems, as on other kinds of change.[36] Admittedly, this conditionality has a tactical justification; a code's approval is indisputable whereas progress in reducing human rights abuses, eliminating impunity, or increasing access is far more difficult to track and is subject to many alternative interpretations. It begs the questions, however, as to whether the new code really represents an improvement and whether the elimination of the objected practices, by law or by whatever other method works, is not the more important test of success.

The second, *instrumentalist*, position gives a positive answer to the second question, and conditions the answer to the first on the code's real impact. It is less dogmatic about the fundamental philosophical leanings of one legal system or another, seeing law as only one of many factors shaping performance. The same law may produce different results in different politico cultural settings. Where law does not cause undesirable practices, it may reinforce them, inhibit innovative improvements, and generally stand in the way of a more efficient, effective process. And while law is rarely if ever sufficient to change behaviors, it may help initiate that

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[35]Thus one of major authors of many new criminal procedures codes presented a paper in a 1991 conference, in which he redefined global reforms, insisting that not even code revision was enough. The arguments are summarized and elaborated in his later writings. See Binder (1997) and Binder in Maier.

[36] Interestingly, this runs counter to current academic tendencies to find merit in both adversarial and inquisitorial systems or to see a convergence between the two. Some U.S. academics (see Strier) have even argued for the inquisitorial system's superiority.

change, accelerate those that are already underway, or recognize those that have already occurred.[37] In effect, the instrumental position finds the source of the shortcomings and even of such intervening variables as judicial culture less in the specific legal system or framework than in the political and historical context; countries with similar patterns of development can be expected to demonstrate comparable legal vices even where their legal traditions are different The prognosis for change is not negative, but the approach does imply that it is cumulative, multi-dimensional, and entails a more complex interaction among a variety of interventions at the level of behaviors, rules, and attitudes.[38]

The situation is changing, but historically, Latin American reformers have been structuralists. Their traditional view is that laws define a whole ethos as opposed to just facilitating or encouraging undesirable practices. They have tended to favor a deductive methodology, which uses laws' conformity with a series of general principles rather than observed behaviors to determine where change is needed, and wholesale code reform over partial modifications. In contrast the instrumentalist approach is more inductive in its methodology, working backwards from observed problems, and in consequence usually favors partial, incremental change. Of all Latin American countries, so far only Panama has intentionally chosen partial reform, and this was less out of preference than the fear that rewriting an entire code would invite manipulation by Congress. As opposed to the Panamanian strategy, most countries chose global revisions. This is inevitably a lengthier process, although frequently less radical than anticipated.[39] The revisions retain many existing procedures; the drafters, guided by a their axiomatic rules, alter only those practices which appear to violate them. The process may be long and conflict ridden, but the conflicts tend to target a limited number of issues. It is possible that Panama with its five partial reforms produced as much behavioral change as any of the entirely reformed codes.

On the issue of timing, the structuralists also insist that code reform must come early and is inherent to success. While increasingly programs have moved to prior institutional strengthening and educational work to prepare for code implementation, reform's success is linked to the code's passage as opposed to this "preparatory change." This appreciation can be contrasted with the instrumentalist view that the "preparatory" work is the essence of reform. Legal change can fill in the gaps or provide the justification and impetus, but once the preparation is effected, the

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[37]This may be more easily appreciated in the United States where landmark Supreme Court decisions frequently follow rather than initiate emerging trends. The Court's use of "ripeness" as a criterion for selecting cases recognizes this tendency.

[38]Fennell, et al. offers a relevant discussion vis-a-vis how common problems have emerged and are addressed in European civil and common law systems. The authors do note the problems of transferring solutions, not because of differing philosophical bases but rather because of the systemic (interconnected) nature of legal and institutional arrangements.

[39]See Vargas for an interesting discussion on the new "adversarial" codes' retention of many inquisitorial practices.

law's actual passage is almost superfluous. This view has not characterized the official position in any Latin American reform, although actual experience lends it some support.. One has only to look at El Salvador and Guatemala for examples. The former's new procedural code was approved (after a two year delay) in late 1996 and will not enter effect until 1998; the latter approved its code in 1992 and put it into effect in 1994. Yet in terms of actual progress in changing operations, El Salvador had advanced furthest by early 1997. Still, many observers, including USAID, continued to regard El Salvador as a failure until its code package was approved. On the basis of such examples, a few observers have begun to argue that global code revision is a waste of time and that smaller targeted changes are equally or more effective in improving over all performance. Their argument rests not only on what they see as an excessive investment in code revision, but also on the possibility that the deductive, global approach encourages counterproductive innovations while leaving many dysfunctional (but "morally neutral") practices in place.

The Latin American programs have vacillated between the two substrategies and at a very general level are compatible with both. While the discussion here obviously favors the instrumentalist variation, there is insufficient evidence for determining which offers the most correct diagnosis of Latin America's judicial ills. The larger problem is that, whether correct or not, the structuralist strategy has exceeded its present capabilities. It presupposes a certainty about means and ends and generic solutions that simply do not exist. A deductive approach requires an adequate knowledge base to inform its application. Absent one, it derives too many solutions from too narrow a set of principles. In practice, it also confuses axiomatic (untestable) principles with hypothesized causal relationships.[40] The method coincides with traditional cultural preferences, but it has also produced unsound imitations and innovations, diverted attention from implementation, and perhaps increased the gap between legal and social reality. The more inductive instrumentalists can and have fallen into the same vices, but more from insufficient rather than excessive attachment to their strategy. In attempting to resolve specific problems, they have not been immune to the convenience of uncritical adoption of what "worked" somewhere else. In short, a law based strategy can be effective, but it is conditioned by the quality of the laws it imposes. "Legal science," as the structuralists like to call it, is insufficiently advanced to allow a completely deductive approach to code revision. Hence, whether revisions are global or partial, prior to or after the fact, they still must be judged by their real impact on performance not just by the principles which inform them. One further question is whether means exist for anticipating this judgment or still better, ensuring positive outcomes.

[40]See Binder in Maier for a discussion of the ten principles informing the criminal code reforms.

Refining the Strategy: Ensuring the Quality of Reformed Codes

Curiously, USAID projects have directed little if any attention to the quality of the new codes, tending to accept the assessments of their authors and local allies. Years of discussions about criminal justice reform have produced some consensus on essential elements among its Latin American promoters. As noted, much of this consensus rests on hypothesized relationships, not "proven" truths. Furthermore, in a code that runs to four hundred or more articles, much of what is changed, or left in place is the result of still more arbitrary decisions. There is no comparable consensus and thus no comparable indicators for other types of codes.

The donors' failure to examine the codes more carefully is understandable, a combination of cultural sensitivity and respect for an unfamiliar expertise. However, a comparable inattention to the details of a policy shaping activities in other sectors is rare. Economic, fiscal, health, and educational laws and policies are usually scrutinized quite carefully, not only in terms of their internal consistency but also as regards technical soundness. In other democracy programs, when a law is proposed or required, it is usually vetted quite carefully both against preestablished criteria and a freer evaluation of its likely effects.[41] A country approves the policies and laws it wants, but donors are generally more cautious as to what they support.

In assessing the quality or utility of reformed codes (or for that matter, more narrowly defined laws), two types of considerations are important. The first involve content, and such issues as:

> the objectives pursued in the revision (do they match real demands, address high priority problems, appear consistent with other policy goals?);
>
> the compatibility between the intended purposes and the measures introduced (are all the objectives addressed or is the code skewed toward a subset of interests or goals?);
>
> the credibility of those measures (i.e. are they based in reputable theory, empirical examples, or do they at least meet the test of common sense?);
>
> internal consistency and coherence (are the procedures and logical sequences outlined possible, or have the authors performed the functional equivalent of building staircases

[41]Electoral laws are a good example. Support for elections often includes conditionality as to specific changes in the laws governing how they will be held, the operations and composition of electoral tribunals, and how elected positions will be competed. Proposed drafts are usually scrutinized carefully because of the possibility of manipulating even these criteria to reverse or undermine the official goals. I have been reminded by readers that the results are not always successful; however, the point is that the effort is made.

into walls?).[42]

A proposed code may pass all these tests and still be impossible to implement in the target environment. The second set of considerations addresses these concerns, focusing on institutional capabilities and cultural-historical circumstances. Relevant issues include:

> cost of initial implementation and of operations over time (are costs reasonable? If not, are there ways to reduce them without undermining the objectives);[43]
>
> institutional infrastructure (does it exist or can it be created? In the case of a negative answer, how will this affect outcomes?);
>
> cultural compatibility (do the various assumptions about reactions, motives, and capabilities hold in the specific cultural setting?[44] If not are their means to increase compatibility?)

The suggested analysis treats laws like any development policy. This is entirely intentional as is the implicit message that much of the required expertise is not legal. This is most obvious in the second set of issues, but the first set also includes non-legal determinations. As suggested, many of the new codes would not have passed either set of questions. A check list can be an interesting ad hoc means for assessing quality. However, it is more useful as a guide to drafting. The final

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[42]It is not uncommon for code drafters to overlook contingencies or write in impossible sequences of events. (See Appendix) Careful reading is recommended, but more practical ways of testing for this kind of error include simulated trials, hypothetical cases, and discussions based on flow charts. USAID's Bolivia project has used the latter to especially good effect.

[43]Codes often assume or imply a substantial increase in infrastructure, equipment, and personnel. This can often be reduced without negative consequences; down scaling may be an improvement. For example, the introduction of a new function often assumes the creation of a new position to carry it out. An assessment of projected workload may indicate that it is not a full-time task. By assigning it to an existing official, costs are held down and the vices encouraged by an under-utilized workforce are avoided.

[44]This question aims at one of the greatest dangers of imitating laws and practices in effect elsewhere. Specialists in comparative law have repeatedly stressed that measures often work not because they are inherently better but because of the institutional and cultural context in which they operate. Where that context does not exist, their adoption usually requires modifications to compensate for its absence. Obvious considerations include factors like literacy, language, and use of written records which may be required to prove ownership or even existence (e.g. birth certificates). Less obvious ones include attitudes toward authority, stereotypes associated with different social and professional groups, or expectations about different kinds of written and verbal commitments.

section addresses the question of how this and other perspectives can be introduced into the strategic model to improve the process it defines and thus increase the chances that code-driven strategies will produce real reform.

Some General Observations on the Code-Driven Strategy

1. Code reform focuses on intra-sectoral change. Where the principal causes of poor performance are extra-sectoral, it is not an appropriate choice. Where they are both intra- and extra-sectoral, its efficacy will depend not only on its effective application, but also on efforts to produce extra-sectoral change.

2 The extent of the need for legal change to bring wider improvement in performance varies with the type of problem identified and the type of legal system. Although in general most observers would not credit the position that code reform is sufficient, there are historical and cultural situations where it may be a more essential.

a Because of its expectation that statutory law defines practice, a civil law system is more likely to require law revision as a prelude to other types of change. The reasons are both symbolic and instrumental. Code reform may not produce real change, but if people believe it will, it becomes a necessary condition. Moreover, given the legal inflexibility of the civil law system, changing statutory law, although not necessarily full blown code reform, may be a the only way to introduce certain kinds of change.

b. A common law system, because it allows for more flexibility, does not expect everything to be a defined by statues, may work reform with only very targeted changes. Here, a greater emphasis on legal reform here may be both unnecessary and undesirable.

c. In other legal traditions, the utility and even the feasibility of law revision remain to be explored. Where law has religious significance or other non secular roots, its modification may be the most difficult rather than the easiest reform tool.

3 Code reform may be the easiest way of getting people to commit to a reform program and in some cases may be the only kind of reform they understand. It may also become a way of leveraging and orienting other kinds of change, as preparations for the new legal framework.

4 Code reform is an activity and not of itself a strategy or a goal. Support may be based on short-term tactical interests or on a variety of strategic visions. An ability to aggregate support is important to its success, but a broad alliance can also distort implementation.

5.The efficacy of code reform strategies depends on both their adequate analysis of underlying problems and their feasibility -- i.e. whether the elements exist to put the strategy into operation. Wholly deductive, structuralist approaches to code reform are not recommended for this reason. The approach may be "correct," but we lack the knowledge required to implement it.

6. A law is essentially a developmental hypothesis and should be evaluated in just those terms. Evaluation involves far more than legal criteria, even as it extends to legal institutions and procedures.

7. A fixation on code revision as the equivalent or major indicator of reform can detract attention and resources from issues of preparation and implementation. It can also detract attention from the need to adjust laws to local circumstances and capabilities.

8. While code reform can always leverage *change*, its utility in producing improved performance depends on the quality of the code. Quality relates both to internal consistency and contextual congruence. It is ultimately defined by impact on behavior and system outputs. It is here, rather than in their abstract statement, that conformity with principles counts.

THE STRATEGIC MODEL: RECOMMENDATIONS FOR IMPROVED APPLICATIONS

The principal strength and shortcoming of Latin America's code-driven strategy is its emphasis on laws. This has been a convenient fiction to justify more fundamental changes in the regions' justice systems, but it has also encouraged an inversion of means and ends. It is hard to separate the Latin American experience from its special fascination with introducing oral, adversarial procedures, although as one observer[45] emphatically states, the resulting codes hardly represent great advances in either direction. However, the distinction is important since the strategy is now being proposed for other types of codes and other regions. The essential part of the code-driven strategy is not the laws it produces but the quality of the changes they effect. Since in civil code countries, laws define processes and principles, changing the latter requires legal change. Nonetheless, it is the thought that goes into that change not its enactment in a law that is critical. Here we are back to process, and to the strategic model. The recommendations made here are applicable to any law revision, whether partial or global, secondary to another strategy, or as in Latin America its raison d'etre. Rewriting laws is not reform, but adequately done, law revision is an important element of a reform strategy.

Initial Steps: The Reform Alliance

***Rationale**:* Any externally supported reform requires local allies. These are not necessarily the intellectual authors of the reform, but rather its political backers. They may be a located in government, in the target institutions, or in private organizations. This is the group which will assume ownership of the strategy and take responsibility for its implementation. Their selection is hardly open-ended and depends on the local situation and certain limitations imposed by the identity of the external partner (e.g. whether they must work with governmental institutions). Ideally the alliance is based not only on discrete activities, but also on an expanding consensus on goals and overall strategy.

***What Was Done**:* In Latin America, code reform usually emerged after a general reform program had been established; thus, the partners were in some sense provided. For better or worse, code reform was usually acceptable to most of them, and in fact was frequently their suggestion. The problem has been less attracting allies than ensuring that their peripheral interests and diverse understandings did not undermine long term goals. Alliance members were linked by identification with an activity, but not necessarily by common objectives or a shared strategic vision. This is entirely typical of reform politics and the essence of coalition building. Over time, and at least in the criminal justice area, many supporters have come to a more instrumentalist vision of the role of law reform, admitting the need for implementation and transition plans, modification of some of the less realistic aspects of the new laws, and further institutional strengthening. This has not meant an abandonment of the guiding principles, but rather a realization that of themselves they are insufficient to orient action.

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[45]Vargas.

Unfortunately, much of this realization has come as an afterthought, and for some of the more difficult issues has still not penetrated. It seems not to have extended to new legal areas, where proposals for further stand-alone law revision continue to be made. A political leader who speaks eloquently about the need for planning the implementation of the new criminal codes can still suggest the immediate, simultaneous drafting and enactment of new civil, commercial, and administrative legislation. In short, whether because of a truncated strategic vision or simple expediency, "political will" for law revision still far exceeds that for complementary actions.

Recommendations: As others have repeatedly observed, reform is political, and politics is the art of purposeful compromise and negotiation. External partners have forced their vision of reform in such specific areas as the civilianization of the police, but even there have required local allies and massive resources. Code reforms and other non-police programs in the sector do not lend themselves to this approach, and require more voluntary local cooperation. The problem emerges when the price of that cooperation is sponsorship of unsound, counterproductive, or otherwise undesirable activities. Externally supported reforms will always find local allies, but they may not be a strategically placed or may have incompatible private agendas. On the other hand, reform will never advance if absolute agreement is a precondition for alliance formation.

Specific practical recommendations are difficult. The obvious rule is to know your objectives and never assume compatible or incompatible interests. It helps to know where allies and opposition are heading, but prejudgment often defeats useful compromises (and encourages other, far less useful ones). Fortunately, reform is educational for all parties and the areas of agreement can expand over time. Allies who once wanted only new codes, now stress implementation. Those who wanted showy training programs are now questioning their efficacy and efficiency. Contact among participants in different national projects has produced an interest in transition plans and costing out of new programs.

Much of this learning is most effective at the working level, percolating up more slowly to institutional and political leaders. This may not eliminate their private agendas, but it could encourage their more judicious application since no one wants to back a bad reform. The process could arguably be a accelerated by several measures:

1. A greater effort to identify teams of strategic planners within the affected institutions, reform groups, and private organizations and to encourage them to work together

2. Greater exposure of this group to training, outside consultants, and regional conferences and exchanges

3. The use of knowledgeable leaders from countries which are further along in the process for direct encounters with higher level allies. As bad advice is worse than no advice at all, selections should be made carefully. Just having been present when a reform was conducted is no guarantee that one understands or even supports it.

4. Frequent partial evaluations to detect or predict problems and their use in discussions at the working level and with high level allies. The studies can be done within the affected institutions or by NGO allies, but the use of outside experts is also recommended as they are usually accorded more authority.

Initial Steps: the Assessment

Rationale*:* Although USAID's allies were ready to prescribe code reform without further study, for outsiders and even for local reformers, some kind of diagnostic is highly desirable before activities are formally initiated. At the very least, it will provide a baseline against which to measure change, even if in highly qualitative form. It should also provide a more thorough depiction of the current situation and may be a way of testing the prevailing explanations as to what is wrong and why. Assessment and other kinds of diagnostics often produce some surprising revelations, reversing or redirecting conventional wisdom.[46] Of course an understanding of the nature and origins of a problem may not provide a solution. Conditions giving rise to a practice can disappear while the practice lives on; its elimination requires other measures. The introduction of legislation may be needed to eliminate procedures based on custom or precedent. Conversely, where there is resistance to changing laws, the practices they appear to mandate can be a altered by offering new interpretations or innovative alternatives. Still, this kind of study can help avoid the solution of nonexistent problems or the adoption of remedies that are unlikely to succeed because they address a symptom or a peripheral cause.

What Was Done*:* In the earliest Latin American programs, assessments were conducted prior to formal alliance building, and were used, not very effectively, as a way to create consensus on the need for reform and immediate and long term goals. For the era, their cost (roughly $250,000 a piece) was high. Today, reduced project funding, the likelihood that comparable studies would cost far more, and complaints about their inadequate use have discouraged similar attempts. Where assessments are done, they are far less ambitious, tending to be general overviews.

Although few criminal code reforms seem informed by the sector assessments, the studies were useful in justifying their introduction and planning implementation. They also helped identify additional political and structural impediments to change which had to be addressed separately. The new codes have assigned different roles to existing institutions and mandated the creation of

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[46]The dimensions of the pre-trial detainee population is one example. Studies of workloads handled by judges and other officials is another. Whereas the detainee population was usually underestimated, real workloads (active cases) often were far less than believed, contradicting a frequent conclusion that court congestion and delays are the result of insufficient staffing. Discussions surrounding the need for civil and especially commercial code reforms suggest that conventional wisdom may also be misleading, both as regards general causal relationships and their impact in specific countries. See Sherwood for an illustrative list. Recent arguments that poor laws are the major impediments to foreign investment in Cambodia, Bolivia, and the Congo (ex-Zaire) also indicate the need for further studies.

others. Knowing the weaknesses of the old institutions or being able to estimate the demand for new services has helped orient institutional strengthening programs and public education campaigns. Arguably code design might have been improved by more attention to the assessment data, and would have avoided unrealistic and unattainable goals. Assessment design might also have been improved by more attention to the proposals of code designers. While identifying some areas where existing legislation created or aggravated problems, they hardly included an exhaustive analysis of the codes' failings or of recommended changes. One complaint about the assessments done in Central America is that they generated too much data, much of which will be a out of date before it can be a used. In short, where code reform is a likely outcome regardless of the assessment's findings, an earlier and closer coordination of assessment and drafting seems in order. Ideally, code reform should not be a foregone conclusion; where it is, the assessment can be designed to facilitate and improve it.

Recommendations: First, given the cost and delays incurred in the initial sector assessments, and the common complaint that they generated more data than could be a used, it may be more efficient to do an initial overview survey with a far less ambitious coverage. At least by default this recommendation has been followed in the second wave of Latin American projects. No one now has the time or money to mount a second set of global assessments, and given the similarity of the region's sectors, it is debatable whether they would be justified in terms of new findings. Where the differences are in the details, it is the details that merit study, not the grand outlines.

Second, in regions and legal traditions or subjects where prior work has not been done, some intermediate ground will have to be found. a first incursion into a legal issue or cultural tradition requires a good overview to understand the basic problems and the potential for change. Still, a series of assessments of increasing depth and intensity seems preferable to an effort to collect all potentially relevant information at once.

Third, the overview should thus be followed by a series of focused diagnostics in the areas targeted for intervention These could be organized by problem area (e.g. impediments to commercial expansion, human rights, crime prevention) or proposed activities (training, code reform, etc). In either case, necessary legal changes should receive more intensive and exhaustive treatment.

Fourth, where the additional diagnostic focuses specifically on the legal framework, it must include various institutional viewpoints and incorporate organizational, sociological, financial, and substantive as well as strictly legal experts. If only from the standpoint of anticipating costs and institutional capabilities, Latin America's new criminal codes would have benefitted from this background. It is still more essential where the justice system impinges on other policy sectors and where the direct and indirect consequences of ill-conceived innovations could be still more disruptive. Neither USAID nor any other donor has much experience with this kind of diagnostic, but problems encountered with the criminal legislation suggest that it is needed.

Fifth, the findings from the assessments and studies should provide the basis for discussions with

reform partners on the overall strategy to be followed as well as the role and content of law revision. Such discussions were conducted in conjunction with the Latin American assessments, often with less than optimal results. Since they tended to be concentrated in a single national round table, presenting the final study and attempting to draw out conclusions, this was almost inevitable. Authentic group development of a strategy takes far more time; the more practical alternative is a series of small working groups which advance a plan for broader approval, probably in several stages.

In summary, the first overview assessment provides working hypotheses as to necessary changes. These can be tested and elaborated in another study or series of studies, and used as the basis for designing and disseminating a reform plan. Counterparts have often protested both kinds of assessments, preferring to write the codes and limit outside consultations to what are effectively promotional campaigns. Overcoming this resistance is difficult. However, allowing it to prevail will only perpetuate a practice which at least in part accounts for the inadequacy of existing laws.

Writing New Laws

Rationale: Law reform is like many justice reform activities, easy to do and extremely difficult to do well. Anyone can write a new law; writing one that constitutes a real improvement and which will be accepted, enacted, and have the desired effects is considerably more difficult. Surprisingly, assistance activities have focused remarkably little attention on how codes are drafted (nor as noted, on the results). Process is obviously important for its immediate impact on code content; it also has a critical influence on approval and implementation. The lack of attention is sometimes justified by the availability of model codes which need only be adjusted to national reality. That would at most take care of the first concern, quality, but even there, if such models do exist, neither their selection nor adjustment has been visibly adequate.

***What Was Done*:** In code drafting, the regional tradition, dating from the past century, is to use a local or foreign "eminent jurist" who relies on generic or foreign models. Computer technology has made this easier, although not necessarily better, by allowing the drafter to work off a dozen or so representative laws stored in a computer data base. It has been argued that in a civil law country, the drafting should go to a civil law jurist since law writing style does differ over legal traditions. Foreign experts from other civil law countries have also been criticized for writing laws that don't correspond to "national reality." This high sounding criticism in the end often means that they did not use the local legal terminology -- the *indagatoria* may be called the *instructiva* or the *denuncia,* the *demanda.* However, in its more usual sense, national reality is important, and both local and foreign authors have demonstrable problems dealing with it.

Drafting is usually restricted to a small group, all of whom are lawyers. Most often, it is also limited to those sharing the drafters' ideological view or viewpoint, sometimes functioning as the disciples of an imported expert. This has tended to produce "lop-sided" codes, which optimize one set of values or intended impacts while ignoring any others. This is especially critical when the ignored views are those of individuals who will apply, work with, or be affected by the new

law. Several reasons for this phenomenon have already been discussed. While it has skewed the impact of the criminal codes, this has served largely ideological ends. As code reform enters noncriminal areas ,the intrusion of political-economic interests also becomes a concern, whether introduced intentionally or not. Here an overly narrow perspective on the problems addressed can have a very concrete substantive impacts.

If law drafting is the business of lawyers, two aspects of Latin American legal education have added complications. The first is its doctrinal, anti-empirical focus. When the region's jurists speak of a law as "progressive" or "working" they are usually referring to its compliance with what are assumed to be the grand (ideological) principles, not with the tangible results of its enactment. In this sense, Latin America legal thought has been described as backward rather than forward looking,[47] an especially accurate depiction when the principles are decades if not centuries old. Respect for doctrine also means that a relatively inexperienced lawyer with a distinguished academic degree may be a accorded more authority on how things ought to be than an attorney with years of practice but less illustrious scholarly credentials. Second, because law is an undergraduate degree, its graduates are typically unversed in the basics of such disciplines as economics and finance, psychology, sociology, and political science. Like the majority of their colleagues everywhere, their comparative background is usually scant and fairly superficial; the law which they know is the law with which they have worked. Thus even when they attempt to rewrite procedures to reflect new trends, they are limited by their experience. The result is frequently a strange hybrid which conforms to neither system, and may mix the worst elements of both. Inadequate substantive background can affect even criminal legislation, but is obviously most critical in more specialized civil areas.

One partial solution is to encourage broader participation in setting the content of the laws, if not in their actual writing. However, getting counterparts to allow this kind of consultation before, or even after, the draft is completed, has not been easy. Efforts to induce the Salvadoran Ministry of Justice to invite the views of businessmen and other economic actors on a proposed redrafting of the civil procedures code met with little success. In the case of the Salvadoran and Ecuadoran criminal procedures codes, while the project agreements stipulated that it would occur, neither the outside consultants nor the local counterparts were visibly interested in doing more than a minimal outreach program. Aside from inadequate information, the lack of broader participation can have further negative consequences. It has been suggested[48] that the exclusion of local experts or the restriction of their participation to an apprenticeship role fed the opposition to the Salvadoran criminal justice package. Observers have speculated that the inclusion of more local jurists might have given them a stake in the reform, required only minor changes in its content, and prevented the formation of a more extreme opposition which delayed the code's passage for several years.

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[47]This was also said to characterize U.S. legal scholarship under the reign of legal formalism in the late nineteenth century. See Horwitz, Friedman.

[48]Mudge, 1996.

There are positive examples of the use of consultations. Costa Rica, although passing its new criminal procedures code with less consultation than initially proposed, allowed eighteen months for preparation and further discussion. Some of this has already identified areas requiring modification. One of these is in the regulation of prison conditions; the drafters while very concerned for the well being and far treatment of prisoners had overlooked situations requiring prison officials to act more rapidly than the due process code dictated. Faced with an imminent riot, prison officials cannot wait twenty-four hours for a judge's permission to transfer prisoners. More generally, such institutional consultations have been rare. This is a frequent source of problems once the code enters effect. Where the participating institutions were never adequately consulted they may not understand their new role and thus be unprepared to assume it.

Unfortunately, Latin America, and undoubtedly many other regions of the world, lack a tradition of prior analysis and examination of proposed laws, against not only doctrinal principles, but in terms of institutional capabilities and their likely wider effects. Their surprised reactions following passage of a law indicates that legislators themselves may not read carefully or critically. In those cases where affected institutions have been asked to provide comments, they sometimes have little to say. They often focus on minor details, semantic issues, or the most individualized concerns (e.g. what this means for the power, responsibilities, and salary of the reviewer). These concerns are important as they may affect acceptance of the proposal, but they are of little assistance in addressing the larger questions of feasibility.

Even when prior consultation occurs, the guidance it provides is sketchy at best, and there is a question of what to do with what isn't mentioned, and how much free rein this gives the drafter. In the civil code tradition, the law's silences are taken as a prohibition on action; apparently there is no analogous rule for law drafting. Some of the most radical elements of new codes have come not out of prior consensus, but rather in those areas where nothing was said, and where the drafter felt licensed to innovate. The innovations may be useful, but they should be closely examined to determine whether there is any basis for expecting they will work. If not, their inclusion should be reconsidered very carefully.

***Recommendations*:** First, it is generally conceded that law drafting is not a committee activity and that a small group or even a single individual will do the actual writing. Their identity and the perspectives they bring both to the product and the process are important, but should not be the sole or even principal determinants of content. The problems start when the drafter becomes the code's owner. Experience suggests that an underlying failing may be an over reliance on a single "expert." The expert may indeed be able to write a code, in fact may have drafted several, but cannot be expected to have all the theoretical, comparative, and experiential knowledge required to develop a complex law that will work in a specific national setting.

a technique used with some success for Costa Rica's criminal legislation has been a series of drafters, with a second or third group revising what a first drafter began. Still more importantly, all the drafters of Costa Rica's latest series of codes were practitioners and members of the judiciary. They thus could bring their experience to the task. The principal drafters in other

countries (Bolivia, El Salvador, Ecuador, and Guatemala) were theorists whose product suffered from their less practical outlook. One evident problem as one moves away from criminal legislation, is the absence of potential drafters with broad-based substantive as well as legal background. The solution may be found less in the identity of the drafter than in the way in which his efforts are directed.

Second, this writing should be a informed by considerably more prior discussion than is usually the case, and followed by still more consultation. Whether or not the need for legal reform is indicated in a sector assessment, the latter is usually not sufficient to guide the drafters' work. As a more focused diagnostic or a less formal consultative process, further guidance and orientation should precede as well as follow the initial drafting. While it may serve this end, *the consultative process is not a support building activity*. Thus, the sheer number of individuals involved is less important than the inclusion of the *relevant* institutional and client outlooks. Given the difficulties sometimes encountered in eliciting useful comments, techniques should be a sought for facilitating discussion, or for deriving the information by some other fashion.

Third, drafting is not the ideal place to build support, but it should not engender opposition. Those groups who feel they have a stake in the law, whether or not they can add information, should not be excluded.

Fourth, laws should be a drafted for implementation. This is not wholly guaranteed by expanding consultation. Additional analysis may be a required to determine feasibility, unforeseen side-effects, and likely, as opposed to desired, impact. One alternative is to commission expert studies. This may not develop wider ownership of the laws, but it can improve their quality and identify potential obstacles and bottlenecks. In both El Salvador and Peru, external experts were brought in to review the criminal procedures codes from the standpoint of the institutional roles they represented. This has been particularly helpful in fleshing out the sections on prosecution and defense, and in eliminating some unintended impediments to effective investigation. Prosecutors serving as trainers in Colombia and Haiti also suggested modifications to new criminal legislation in those countries.

Fifth, no code should be released without adequate assessment of its projected operating costs. Except for Chile and Uruguay, no Latin American country has done a serious analysis of likely budgetary impacts. This has been proposed in several USAID projects, but a methodology remains to be a developed. The administrative and budgetary chaos sometimes characterizing sectoral operations complicates matters, making extrapolations from current costs a dubious solution. While Peruvian contentions that their current reform will lower operational costs strikes some observers as overly optimistic, most systems do not use resources efficiently. Thus, reforms can and should increase productivity. However, greater cost-effectiveness is of little worth if the country cannot afford the new system in the first place.

Sixth, these and related studies constitute one of the areas where USAID and other donors could provide additional assistance based on techniques used with other programs -- economic, social

soundness, gender and institutional analysis . The impact analyses should at the least include a financial and economic study and evaluations of institutional soundness. They may also revisit the issue of institutional capabilities by giving those required to implement the legislation or affected by it another chance to examine and comment on it. If not attempted in prior consultations, this may be a the place to introduce mechanisms to encourage participants to think analytically. Where procedural codes are involved, simulations of trials and investigations may test feasibility of new practices. Substantive regulations may require hypothetical cases for discussion External impact evaluators may also be helpful in assessing unanticipated consequences and the reactions of targeted beneficiaries as well as the wider public.

Seventh, although Latin Americans have usually preferred to over determine laws, putting in constitutions what others reserve for statutes, and in statutes what might go in regulations, a reversal of this practice is recommended. In the past this has sometimes meant that the regulations and thus implementation were delayed for years. If delays can be a avoided, the advantage is that regulations can be a changed more easily than can statutory law. It almost goes without saying that introducing changes constitutionally is asking for trouble.[49] It has also been suggested that new procedures be adopted on an experimental basis.[50] This has sometimes been resisted with the argument that it endorses unequal treatment; a transition plan which mandates gradual implementation may serve the same purpose with less opposition.

Eighth, another solution is the use of partial reforms. Throughout Latin America only Panama attempted this with its Criminal Procedures Code. Panama's success may be due in part to the unique system with which it started. Contrary to regional trends, Panama strengthened its Public Ministry (and eliminated its instructional judges) in the 1940s. Thus it required less change than did many other countries. Nonetheless, its success and the problems encountered by more ambitious code reforms do recommend a more serious look at targeted change.

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[49]Among the less felicitous constitutional provisions are those specifying the number and placement of lower level courts and other sector officials -- for example that there shall be one first-instance judge, public defender, or prosecutor in every population center over a certain size. This virtually guarantees underutilized public employees whose functions could probably be a performed in more cost effective manners.

[50]Vargas makes this suggestion, noting that in federal systems it can be a facilitated by first testing changes in single subnational units.

Getting Laws Approved

Rationale: Another area requiring greater strategic focus is that of securing the approval of the proposed legislation. Circumstances, and governments, change. Where there was once commitment to code reform, its enactment may no longer look interesting or feasible. This is especially likely when the codes lose their governmental sponsor or when they are drafted by a nongovernmental group. However, continued high-level backing may still be insufficient to override congressional inertia, partisan opposition, or new concerns and interests awakened by wider dissemination of the proposed changes. The conventional recommendations stress building or rebuilding political will through the activation of special constituencies and public support It has also been proposed that support building activities contain an informational component to prepare officials and the general public for the laws' implementation.

What Was Done: The actions taken range from lobbying with legislators and other government officials to public information and education campaigns. For international partners in these programs, there is an immediate problem. Drafting can be externally financed; the political part of getting a law passed is arguably more appropriate for the host country. There has been understandable reluctance on the part of USAID or other external partners to campaign actively for someone else's policy change. This does not preclude conditioning further assistance on that change being made. There are more practical constraints. a foreign agency's involvement may generate opposition or fail because of insufficient understanding of the political milieu. However, leaving the promotion to local allies, or limiting external support to its financing but not its design and implementation, has not always guaranteed an effective campaign. In countries where legislation is often passed by decree or negotiation among political elites, the local reformers may not know how to manage public support and discussion. Where campaigns are undertaken, the messages disseminated increase awareness of proposed changes and, absent other opposition, create a slightly positive association.[51] They seem unlikely to arouse strong feelings let alone provoke action. There is also the question of how action would be channeled. Not surprisingly, the campaign is sometimes less directed at building support for a new law than at augmenting the popularity of a party, political candidate, or other sponsoring entity.

Latin America may be an anomaly, but public support has not been necessary to enact its AOJ related legislation. On closer examination, frequently cited examples deviate considerably from the participatory ideal. In Colombia, a public campaign triggered by the assassinations of three presidential candidates overcame the Supreme Court's historical resistance to a Constituent Assembly and the elaboration and passage of new criminal justice legislation. However, once the Court surrendered its chance to object, public opinion and support had no more specific influence on the content of the constitutional or criminal justice reforms. It is not clear that the public mandate extended any further than a demand that problems of violence and civil unrest be

[51]Messages alternate between the highly informative and the more emotional and symbolic. The latter often feature posters, television spots, and slogans. An Ecuadorian NGO proposed a justice day when reform supporters would march with a flower, symbolizing justice.

addressed. The measures adopted were just one of an infinite number of alternatives. (Since violence and unrest continue, it remains debatable whether they were the most appropriate)

The constitutional reforms were widely and publicly debated by the Constituent Assembly. The criminal legislation, however, was drafted by a small group of presidential advisors during a period when the Congress and Constituent Assembly were not in session. It did draw on discussions and models developed over the prior three decades, but the major participants in this earlier work were not part of the final drafting group. The legislation was passed, without further consultation, by executive decree. While it has been subsequently criticized as inadequate, it closely resembles what has been produced with wider consultation and discussion in many other countries. As elaborated below, its principal flaw was the absence of a realistic implementation plan. It is doubtful that more public involvement would have changed this.

In El Salvador what is often cited as an example of public support for its family legislation, was the relatively spontaneous activation of local NGOs. This was not planned by the USAID project, but was critical in getting the legislation through a Congress with little interest in the proposals. In this case, the NGOs did affect the law's content, insisting on the inclusion of a series of new rights for women, children, and 'the third generation." These additions had no visible basis in wider public opinion; demand for their enforcement remains weak. The NGOs' interest can be characterized as both symbolic and instrumental, and on several points ran against majority opinion in this still very conservative country. Here lack of broader attention may have been an asset, allowing the NGOs to override congressional inertia while avoiding public debate which might have further weakened or defeated the new laws.

When the USAID Salvador project attempted to activate public support, the results were less positive. If in the case of the family and juvenile legislation, passage came almost without public knowledge, the delays in the criminal legislation are both result and cause of increased public attention. Much of this attention was not initially promoted by the project, but as in Colombia accompanied concern about increasing crime and violence. Efforts to respond to this constructively were hindered by the new codes' initial presentation as due process legislation with the backing of local and international NGOs, the United Nations, and foreign donors. The codes' only natural local constituency, human rights NGOs, were already nervous about promoting laws introduced by a rightist government, lacked a full sense of ownership because of their limited role in the drafting, and thus were unwilling to make any more compromises The rest of the legal community, already resentful of the use of foreign experts as principal drafters, were of little help and many echoed the charges that the new laws were soft on crime. The codes' approval was a consequence of international pressures and negotiations among the governing and opposition party leadership. Public opinion continued to characterize the laws as soft on crime, and would apparently have supported still more law-and-order modifications.

The Salvadoran developments are not unusual. Code reforms attract wide public attention with great difficulty;. When they do, the results are rarely predictable and not always positive. The proposed changes are too easily presented as undercutting public interest (e.g. more money for

corrupt judges, more protection for the guilty, attacks on family values) and often hinge on details which leave even the experts confused. Campaigns to develop public support have more often aimed at selling the legislation as opposed to broadening understanding of these details or encouraging wider debate. While often costly,[52] it is not evident that they have succeeded even in this first objective. If they serve any purpose, it is that of affirming government commitment to the code's passage. Once an administration or party has publicly endorsed a bill, it may find it difficult to allow it to die short of enactment. This may be a the best justification for a generous but still inadequate budget for "public support building" in a code reform project.

On the other hand, where there are NGOs, informal interest groups, or individuals who have or might develop a stake in drafting legislation, their involvement can be critical. They may, as with the Salvadoran family legislation, force the inclusion of some largely symbolic and therefore impractical additions, but they can also provide the decisive pressure needed to get laws through an ambivalent Congress. They can also help maintain interest in code reform as administrations come and go, seeking out allies in each new government or group of institutional leaders. No Latin American code has ever flourished solely on NGO support,[53] but without such support, the sudden disappearance of its governmental sponsor can be fatal. Still more critically, if left outside the process, NGOs and less formal interest groups could, as in the case of the Salvadoran criminal legislation, become fairly destructive opposition.

The lines of influence are not unidirectional. In Panama, governmental officials lobbied interest groups to help push the partial revisions of the criminal codes and related legislation through the assembly. As with the other cases, neither the legislature nor the wider public appeared to have an interest in or view on the proposed changes. However, Panama's assembly is notorious for manipulating bills for other purposes, sometimes changing them dramatically, if unintentionally. As a preventative measure, the Public Ministry actively courted interest groups it felt might be a helpful or feared might oppose legislation they didn't understand. When the bills came up for discussion, the groups attended congressional sessions and provided the pressure needed to enact them without modification.

As the examples suggest, constituency building is very context-driven. More is not always better. Timing is essential, variable, and often beyond the reformers' control. Were it not, most reformers might chose to duplicate those cases where the reform initiative arose with a relatively small group, discussion and consultation expanded to include other members of the legal

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[52]Given the amounts invested in support building campaigns in the United States, it is fair to ask what advocates of increased public lobbying envision as realistic budgets. The only advantage for Latin American reformers may be that there is often no funding for the opposition. However, even an effective unopposed campaign would not come cheaply.

[53]However, an Ecuadoran NGO did effectively lobby for the passage of several constitutional amendments affecting the justice sector. Arguably, they might have invested more time and resources in preparing the amendments most of which have not yet gone into effect.

community and selected members of the government and congress, and passage has come almost without public notice or the involvement of a broader range of civil society groups. Most of Costa Rica's codes were passed in this fashion, as were those in Peru in the late 1980s and early 1990s. Such limited participation may be the most efficient way of getting a code approved; as in Peru, it may also provide the least guarantee that it remains in place.

Recommendations: Although the variety of political circumstances, the lack of systematic attention, and the varying results don't provide a basis for extensive generalization, a few tentative conclusions can be drawn.

First, the utility of mobilizing public support for law passage must be evaluated in terms of the specific political system. For better or for worse, most Latin American reforms were enacted without broad public involvement. As regards the quality and feasibility of the codes produced, these tactics may be counterproductive, but only because of the lack of alternative means to elicit information on public demands, likely reactions and other elements essential to implementation.

Second, a modest budget for a public support campaign can help consolidate *government* support for reform. Administrations which have gone on record as backing a reform may be reluctant to backslide. Whether this commitment extends to their successors is another issue, especially if they represent another political party.

Third, NGOs and special interest groups may be important, but their precise role is also system and issue specific. Generally they have been useful in supplying information to improve code drafting and in lobbying for code passage. Sometimes it is impossible to separate the two functions; at others it is convenient or inevitable. For Salvador's Family Code, the NGOs' active involvement was vital to code passage, but neither they nor the drafters were good sources of information on public reactions, demands, and needs. For laws regulating services or economic activities, special interest groups can provide information and support simultaneously. One could exclude commercial groups from commercial code drafting, but it would be a unwise on both counts. Consultations may also be strictly informative. Costa Rica's judicial consultation on its new criminal codes, and the failure to conduct them for the earlier Civil Procedures Code, may account for the difference between the likely success of the former and the civil code's near non-existent impact. The judiciary as a whole was not involved in securing the laws' passage. The consultations, however, shaped the laws content and prepared the ground for its implementation

Fourth, a good deal of the basis for passage is set during the drafting stage -- enemies and errors made here have as much or greater effect on eventual approval as any concerted campaign once the latter's time comes. Special attention should be a directed to situations where an interest already exists, and excluding it may create enemies, or where anticipated opposition, lack of interest, or likely manipulation of the proposed reform make it desirable to call in reinforcements

In summary, code drafting and enactment involve a variety of inputs from a variety of different publics. These have often been lumped together as "public support." The term is misleading since

it mixes passive and active engagement and specialized and general publics. From the standpoint of content, drafters require information but not participation from a wide variety of sources; looking ahead to code passage, they should, however, extend active participation to counteract or coopt potential opposition. Seeking wider ownership at that stage risks unnecessary conflicts and compromises. Implementation requires much wider cooperation on the part of those applying the law and the general public and will be impeded if their capabilities, interests, and reactions have not been taken into account. Without a better understanding of the dynamics of public support writ large, it may be more expedient, if not more democratic, to leave aside the participatory and deliberative ideals, and handle these inputs separately.

Making New Laws Work

Rationale: There are very few self-implementing laws, and the codes included in the USAID programs are not among them. a proposal for code reform which does not consider implementation is about as complete as a bridge design which does not include topological characteristics, predicted use patterns, and available resources. As in obtaining approval of legislation, effective implementation begins when the process of code reform is initiated, not after a code is drafted and approved. If planning and preparatory actions are not begun early, the impact of law revision is at best delayed, and at worst, several steps backwards rather than forwards.

What Was Done*:* Although the lesson is gradually penetrating that laws do not enforce themselves, and that new codes require institutional and cultural preparation, there are few countries that have done this well enough to provide positive models. While Uruguay's civil procedures code is often presented as an ideal example, its wider applicability is limited. Reservations are based on the cost of the system it installed, the amount of impact actually due to legal change (as opposed to higher budgets), and the extent of change really induced.[54] Most of the new criminal legislation will require far more procedural and institutional change than that implicit in Uruguay's code, and may not have Uruguay's luxury of doubling or tripling staff and infrastructure. Still, if Uruguay's code is a less than perfect model, its implementation plan merits duplication. Among its most important elements were a prior assessment of infra structural, personnel and financial requirements; the development and implementation of a plan to provide these elements as they were needed; a training program to instruct existing and new staff in the reformed procedures; and a phased transition plan (to handle both new cases and those begun under old system). In Uruguay much of the implementation planning was done after the code was drafted although it appears that drafters had anticipated much of its content. For more complex changes in less developed systems, planning is best integrated with drafting. Otherwise a subsequent feasibility study may require substantial changes in a finished code.

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[54]As with the criminal codes, the extent of the transformation to an oral system has been grossly exaggerated. There are now oral hearings, but the parties pose their questions through the judge This is the system which Europeans are now preparing to discard.

Uruguay's positive example, can be a compared with several countries which have not fared as well. The cases of Guatemala and Nicaragua, as countries who did absolutely no preparation have already been mentioned. El Salvador with its family and juvenile jurisdictions did allow some time for preparation,[55] but the two laws were introduced almost simultaneously, and the financial resources and time needed were sorely underestimated. a more implementation oriented drafting process might also have eliminated some costly, but less essential details, encouraged more shared functions and facilities, and anticipated the negative consequences of certain procedural requirements. In retrospect, the greater delays in passage of Salvador's criminal codes are fortuitous. They have allowed time for developing and executing programs of institutional strengthening and professional training. These have been most critical in improving the organization and operations of the Fiscalía and Procuraduría (responsible for public defense). Both institutions and the courts as well will require far more improvement; the additional year allowed before the codes enter effect is thus also critical.

Colombia, a country usually noted for its planning capabilities, is also a surprisingly negative example. Its public prosecutor's office (the *Fiscalía General*) which now has a staff of 23,000, half the sector's budget, and a million case backlog, was created virtually overnight. It is only now, five years later, that it is beginning to take seriously its (re)organization. Should it succeed, a comparable lack of preparation on the part of the judiciary is likely to present the next implementation bottleneck. What transition plan existed consisted of passing the 1,100 instructional judges to the Fiscalía along with all criminal cases that had reached the instructional stage. The new institution came close to collapse under the burden. In Guatemala, similar tales are told of the trucks arriving at the Public Ministry's doors with the case files to be transferred.

With the exception of a new U.S. sponsored program for Colombia's *fiscales*, neither country has made effective use of training. Even where training programs have been introduced on a wide scale (El Salvador), their effect on performance and their overall cost-effectiveness have been questioned. Their greatest impact has been in exposing sector officials to the general principles behind the new codes and overcoming resistance to their implantation. Concerns address their utility in teaching participants how to apply the new procedures and in eliminating some of the vices and customary practices they were intended to replace. a further obstacle is posed by the absence of adequate career and personnel systems. Without effective incentives and supervision, new procedural rules and training will not go far.

The third element of code implementation, education of the public and the legal community, has received lesser attention. Programs for the bar are conspicuously absent, especially as regards their training in new skills and procedures. Private lawyers are often the recipients of general information programs and publications, but once codes are in effect, they have been left to adapt as best they can. Given the general state of confusion accompanying implementation, the consequences of this abandon are impossible to assess. More concern has been addressed to the

[55]It may never be known whether it made a difference, but USAID lobbied strenuously for preparation time. The codes initially were to go into effect as soon as approved.

absence of programs to help law schools adapt their curriculum to the new legislation. In this regard, a Colombian proposal to conduct its judicial training through universities is interesting as a possible way of simultaneously resolving two problems

Logically, public information and education programs are a last stage. Preparing the public for new procedures before they are in effect could be a both inefficient and counterproductive. We still don't know enough about what kind of information is needed by the various publics and how this is best conveyed. Public information campaigns already conducted have sometimes produced confusion and an eventual negative reaction when people find they are not receiving the services to which they believed they are entitled. Several factors are at work here, ranging from a tendency to oversell the reform, to the public's own misunderstanding of the message. Foreign consultants have proposed involving sector officials in the public information effort, as judicial or police outreach programs. This suggestion is often not well received. Officials claim they have no time for these activities. For judges, the suggestion also seems to conflict with their image of their role or their notions of what is inappropriate.

Recommendations: Preparation begins by *drafting for implementation*, not solely for ideological or logical consistency. This means first and foremost the writing of codes for a particular political, social, and institutional situation. If institutional, political, and social capabilities are not taken into consideration in the drafting process, effective implementation will be a matter of chance or of lengthy catch-up. Costs must also be a considered. Code drafters often write as though budgets were limitless, or not their problem. This also means that adjustments to budgetary realities will be outside their control, and conceivably not be designed to optimize the code's intended impact.

Second, the implementation context need not remain static. Drafting for implementation includes the development and execution of a plan to prepare the institutional and cultural setting. Organizations which are not suited to their new roles can be prepared prior to having to assume them. If public attitudes, knowledge, and expectations do not support the use of new institutions, they can also be a changed. At the very least, the public requires information on the new rules and services. As one Salvadoran official noted, a reform will have little impact if not one knows about it. Whether codes are seen as a pretext for institutional reform or as the crux of reform, with institutional reorientation a precondition for their success, the sooner this reorientation occurs the better. The older notion that "we will just pass the codes and then see what happens"[56] may sometimes work, but it more often produces minimal change or even regression.

Third, preparation also means a transition plan for putting the code into effect. This is different from organizational preparation. In most cases, code change will catch events in mid execution. Provisions must be made for dealing with those begun under the old system. Ideological purists may reject this option, arguing for the immediate, universal application of the new rules. In most

[56]This actually was said to me apropos of one project I observed. Since the person cited may have had a change of mind, he remains anonymous.

instances this is not practical, and a gradual plan -- one which may adopt only new cases, or shift only certain courts or jurisdictions -- is recommended.

Fourth, although many of the details of implementation will not be aided by public discussion, there is a danger of removing the public from the equation. Thus some of the suggestions about sectoral outreach programs deserve further consideration as a way of eliciting public cooperation with authorities while making the latter aware of the public service nature of their jobs.

A sufficiently detailed discussion of the various elements of code implementation requires separate treatment. To this end, volumes on judicial training, institutional strengthening and public information as a part of support building have been developed. The brief discussion offered here is intended only to emphasize their importance and to stress that, despite their placement as the fourth stage of code-driven reform, they must be a considered from the onset. In some sense, the first half of the message has been more readily absorbed than the second. This is logical insofar as the lesson came with experience for the criminal codes. If no one gave much thought to their implementation while they were drafted, they are being forced to attend to it after the fact. However, it is disturbing that a new generation of code writing is beginning, without prior assessments, with little or no consultation, and with no apparent regard for the requirements for effective implementation. Many of these codes will never be enacted. Given the approach followed and the apparent failure to learn from experience, that might not be a bad idea.

CONCLUSIONS

Code reform has been an important aspect of USAID's Latin American AOJ programs. Its adoption as an organizing theme oriented a series of disparate activities and facilitated changes that might have been achieved far less rapidly. All these changes have not constituted improvements, but in criminal justice they have set an irreversible base for further transformations.

Nonetheless, code reform's potential has been inadequately utilized and occasionally overestimated. Both phenomena can be addressed by more attention to the strategic process and less to the code itself. We may not know what the best law looks like, but we can get closer by focusing on how it is developed rather than on the principles that should inform it. Although a four step model of code driven reform has been presented as a way of laying out the necessary elements, it is hardly a neat sequential process.

First, planning for implementation requires that each step look ahead and back to the others. That this has rarely been the case accounts for many of the setbacks. It may be a more helpful to envision these as four parallel activities each of which occurs throughout the reform process, with varying degrees of emphasis.

Second, the local context and political situation may change the order and relative importance of the various elements. This is not because any of them can be eliminated. Instead, conditions provided by one may already have been met (e.g. there are sufficient studies of sector performance to make a separate assessment superfluous; institutional capabilities and relationships may already have been established) or circumstances may require a different order.

Third, justice reform is no more rational or unidimensional than any other human activity. There are many interests to be reconciled and the agreement finally reached, whether on goals or means, may not coincide with an objective assessment of needs. It's up to the reformers to try to reconcile the diversity without losing sight of their ultimate purpose.

Finally, a law, like a plan or policy, is a developmental hypothesis requiring evaluation in those terms. It may be helpful to develop a checklist like that presented in the section on strategies, so that the questions can be addressed as the law is drafted. Some should be answered before the draft is done; for others, it may be sufficient to articulate a plan to address them later.

These general lessons are applicable to any use of law revision in broader justice or legal reform programs. Code reform, as used in Latin American, may be a less transferable. Even among civil code countries, the Latin American case is unusual. Its peculiar mixture of extremely outdated legislation, highly complex but dysfunctional organization, and massive penetration by political competition and patronage may be unique. Ironically, countries coming to independence more recently have often maintained a higher level of institutional integrity and greater contact with changing legal trends. Their justice systems and courts in particular may be underfinanced,

subject to political pressures and intervention, and incapable of providing services to more than a small part of their population, but they have rarely reached the levels of procedural irrationality and deprofessionalization experienced in many Latin American countries. For them, the essential challenges may be less intra-institutional or intra-sectoral than those defining the institutions' relationships with the broader society and the political power structure. Here code reform is less interesting although more targeted legal change may be appropriate.

This discussion has been very critical of the extremely ideological, often contra-factual thrust of Latin America's code reform movement. However, these traits have been important in organizing support and developing enthusiasm among the groups who are both the targets and agents of change. While the larger purpose is to resolve concrete problems and not just change laws, legal change may provide a more palatable way of achieving this end. Where the problem is defined as the legal framework, it is not necessary to attribute blame to individuals even when the goal is modify their actions.

Just as code reform has its uses, it also has its limits. It often gets the details wrong. Its motivational impacts facilitate but do not substitute for real change. While it avoids the most likely alternative -- reform by external imposition -- it is essentially inward looking and does not address the larger political and constitutional issues which condition its own success; of itself it neither brings judiciaries closer to "the people" nor removes them from more traditional forms of external control. In Latin America, it may now be time to face some of those issues head on rather than attempting to extend the code reform methodology to other legal areas. This is especially true since many of those areas have immediate repercussions extending far beyond the sector. Criminal law is justice's business and may lend itself to more internal policing. However, family, commercial, administrative, and constitutional law involve values and decisions which are not the judiciary or even the legal community's alone to make.

APPENDIX

The Structuralist Approach in Operation: Where the Codes Go Wrong

The following expands on the general arguments about flawed codes for those interested in more details. Discussion focuses on the criminal codes which are easier to summarize because their authors depart from a common set of assumptions. However, the phenomenon is not restricted to criminal law. Analysis is directed to the code's content, not the drafters' failure to plan for implementation. Both are problematic, but the larger point is that an inadequate design cannot be rectified with good implementation.

In the criminal area, most effort has gone into producing new procedural codes, with substantive codes and subsidiary legislation occupying a decidedly second place. The guiding assumptions for all of them can be summarized as follows:

> 1. Although sometimes recognized in the constitutions, criminal justice legislation in Latin America does not incorporate such internationally recognized rights as that to defense, the presumption of innocence, and protection against undue force, unreasonable searches, arbitrary arrests, or excessive delays in case disposition. In consequence such rights are routinely violated. Remedies are of two types. First, the new codes all contain a general section which lays out these and other rights as the guiding principles for criminal procedures. Second, the sections regulating the behaviors, rights and responsibilities of the various parties attempt to incorporate these principles in the detailed descriptions of their actions. They usually mandate nullification of the process if any of the rights are violated.
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> 2. Substantive legislation is not compatible with modern concepts of criminality, criminalizing some actions unnecessarily or giving them excessive penalties, incorporating status crimes,[57] and giving inadequate attention to white collar and modern crimes. As a result the impact of the criminal justice system has fallen disproportionately on the poor and marginalized classes who fill the jails and prisons, while the powerful enjoy impunity. Codes have been rewritten to eliminate these biases and to incorporate a "modern" view of punishment, allowing alternative sentencing and in some cases conciliation or mediation with the victim to stop criminal action.
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> 3. The disproportionate impact also occurs because laws do not allow authorities to select the crimes they will investigate and prosecute on the basis of such criteria as likely results, the seriousness of the offense, or similar considerations. The solution is to introduce the

[57]Status crimes penalize individuals for what they are rather than their actions -- the difference, for example, between being a "criminal type" and committing an actual crime. Until very recently, El Salvador had a law allowing police to detain individuals they judged to be in a "dangerous state." in other words suspicious or unsavory characters.

"principle of opportunity," eliminating the requirement that all reported crimes be given equal attention and allowing officials to direct their efforts where they will have the most socially beneficial results.

4. The inquisitorial system puts the investigation in the hands of an examining judge who operates in secrecy and who often will also decide on the case. This violates the assumption of innocence and the right to defense. Judicial investigation is usually a desk exercise and provides inadequate supervision of the police who are free to collect evidence, extract confessions, and hold suspects as they wish. The solution is to introduce a more adversarial system where the prosecutor (an office which sometimes has to be created) oversees the police investigation, decides whether to indict, and argues the case in court. Defense counsel (provided gratis to indigents, another service which had to be created) must be involved at least from the time of detention, and often from the moment a suspect is identified

5. The largely written system violates the principles of "immediacy" and "publicity" and thus the most reliable means of arriving at the truth. Even if oral hearings are held, the written dossier may constitute the sole evidence. The remedy is the substitution of oral hearings and trials in which an impartial judge (or occasionally a jury) hears oral arguments and testimony and views other evidence, without having participated in its collection.

These are the major concerns and recommendations[58] underlying the new criminal codes. Their adoption has also necessitated changes in secondary legislation to elaborate or create new roles and institutions, or reorganize those in existence. In some cases, constitutional reforms have also been required either to reaffirm the new principles, create new entities, or reassign powers and duties. It should be stressed that they often accompany another series of reform measures and laws directed at increasing judicial independence and reducing political interference in judicial appointments and operations. These changes address concerns separate from those of code reform, but even the most fervent procedural reformers recognize that a thoroughly politicized judiciary is unlike to comply with the best reformed codes.

As should be obvious, the new criminal legislation is driven by a concern with legal protections for the accused (which obviously were needed), and by a conviction that the inquisitorial system does not afford them (obvious, in the form it took in most Latin American countries) while the adversarial system does (more debatable as a general rule[59]). When events and a regional crime wave caught up with the proposed reform, its advocates also argued for the new system's greater efficacy suggesting that an oral, adversarial system was inherently better at reaching the truth of a

[58]For other efforts to summarize the principles, see works by Binder, Vargas, and Maier et al.

[59]For a discussion that turns many of these arguments on there head and concludes that the inquisitorial system is in fact superior, see Strier.

situation. Nonetheless, many of the vices blamed on the existing legal framework (e.g. unsupervised police investigations) violated even its formal requirements; others (inadequate investigation, the impunity of the powerful and the prosecution of the powerless) have more basic socio-political explanations.

As noted, the early results partially vindicated the first set of hypotheses on due process guarantees, although the contributions of the codes themselves are difficult to separate from those of other changes. Any positive impact on efficacy, harder to define and still harder to measure, is more illusive. While in some countries the newly invigorated Public Ministry has shown extraordinary progress prosecuting selected high profile crimes, in almost all, the public perceives it as losing the larger battle. It would be unfair to blame this all on the new codes. They have complicated the situation in two senses. First, their emphasis on due process has produced a popular perception that they are "soft on crime" and in some instances has led to abuses. Through malice, fear, or misunderstanding, judges have released suspects or nullified investigations on what can only be called the flimsiest of technicalities. Second, the emphasis also discouraged attention to those parts of the codes that, without violating due process rights, would facilitate investigation and prosecution. Some codes include provisions that actually obstruct effective investigation -- the stipulation that the authorities notify a suspect within ten days of initiating an investigation (El Salvador), the retention of the *indagatoria* (the formal interview of the suspect) as a necessary step without which the investigation cannot proceed beyond a certain point (Colombia), the inadmissibility of any evidence based on statements made by a suspect when a judge or prosecutor is not present, the nullification of any evidence gathered before a suspect is provided counsel.

The lack of attention to details not involving due process has produced apparently contradictory instructions or inadequate guidance. One critical area is the prosecutorial role of itself and as it relates to the police. El Salvador's new juvenile prosecutors suddenly found themselves with responsibility for directing the police investigation with no further guidance as to what that meant, and as a result, allowed cases to collect while they puzzled on their new duties. Colombia's new fiscales, most of whom are recent recruits, have accumulated one million cases to investigate and currently represent the major bottleneck in that country's criminal justice system. In Panama, a technical assistance program has finally begun to resolve these issues, but arriving at a satisfactory definition of the reform legislation's sketchy instructions has taken years of discussion and trial and error experimentation.

Further modifications of the codes, clarifications in secondary legislation, institutional strengthening, training, and time alone will resolve many of these problems, but it can be argued that the reforms promised and attempted too much with far too little planning, experience, and knowledge behind them. They addressed a major, but still only partial aspect of the sector's problems, and one which in more developed nations attracted attention later rather than earlier,

and gradually rather than this abruptly.[60] In their treatment of some of these guarantees, the code drafters showed far more familiarity with scholarly doctrine than with real practice and current discussions in countries where they are already in effect.[61]

In other areas of criminal procedures, the drafters arbitrarily mixed measures drawn from different legal systems, introduced untested inventions, or retained existing practices despite their contribution to the overall problem. Descriptions of oral trials commonly follow older practices in specifying a set order for the presentation of evidence; uniform time limits are arbitrarily placed on investigations with no consideration for what may really be required. Victims are given the right to demand damages and intervene in the criminal proceedings, options which do not coexist in the models on which they are based.[62] While some procedures were overdetermined, others are barely described so that those charged with carrying them out either fall back on what they have always done or are paralyzed into inactivity. In short, the new codes may have advanced the solution of one part of the problem; they ignored and possibly aggravated others.[63] Aside from

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[60]a historical review of due process rights in the United States reveals, for example, that they are a fairly recent phenomenon, and that many questions on them remain unresolved. The exclusionary rule for evidence dates back to 1914 for federal cases; the Supreme Court only extended its application to the states in 1961. Until 1932, right to counsel meant only if one could pay for a lawyer. In that year with the Scottsboro Boys Case, the Court began to reinterpret that position. Extension of indigent defense to noncapital crimes was only effected in 1963. Due process reforms came still later in Europe. For example, the Dutch adopted the exclusionary rule in the 1970s. Fennell et al., p. 228 and passim.

[61]For example, drafters seem to be only discovering the exclusionary rule for evidence just as it is being reconsidered and modified elsewhere. Rehabilitative theories of punishment, "children's courts," and the virtues of the adversarial system are all under attack in the United States and Europe just as they are being recommended for Latin America. Fads come and go in justice as in other disciplines. There is no guarantee that the latest one is any more appropriate. The larger problem is ignorance of the underlying debate and of the body of studies behind it. It has been argued that past abuses made the most radical stance necessary in the new Latin American codes. Countries without a recent history of police abuses might admit an extrajudicial confession or one without presence of counsel if the defendant waives his rights, but, proponents contend, this is impractical in much of Latin America.

[62]"In recognition of the victim's interest in seeing justice done, [in West Germany] a victim who does not seek damages may sometimes be allowed to intervene on the side of the prosecution." Glendon et al., p. 96.

[63]Although most criticism is here directed at due process "excesses," another group of drafters might have erred in another direction, and arguably did in many of the codes now being replaced. Other U.S. assistance programs in the sector, and especially those to police or anti-drug operations, have frequently been criticized for their law and order or prosecutorial bias and a

strengthening the argument for closer attention to the final product, the experiment also adds support to the recommendations for targeted change. If no guarantee against errors, it might have reduced their number.

The deductively based conventional wisdom shaping criminal code reform may not be worth combating except at the level of detail. No one is going to convince the reformers that an adversarial, oral system is not the solution to all their ills until they discover that on their own. At most one can try to discourage the more improbable inventions, encourage drafting and planning for rational implementation, and provide further assistance when the inevitable new problems emerge. In fact, as the code reform movement extends beyond criminal justice, the application of deductive methods absent a comparable conventional wisdom is still more disturbing. The search for guiding principles or model laws encourages an entirely arbitrary, highly idiosyncratic set of solutions which in the worst of cases may bear no relationship to local demands or needs. Here the chance of learning from others' experience is limited because what is proposed in each case may be entirely different.

In civil procedures and juvenile law there are partial models which are beginning to be enacted with mixed results. In commercial, administrative, and substantive civil law, there is more consistency in how the process is conducted than its specific results. In Latin America, USAID's emphasis on criminal justice has meant its investment in additional codes has been minimal, limited to sponsoring drafting and some technical assistance. It has so far not extended to the financing of assessments to determine the nature of the problem to be addressed. Other donors could conceivably fill this gap, but most national counterparts have resisted the idea of using funds for more studies. Funding limitations and the preferences of the drafters have also tended to restrict broader consultations, especially with the presumed users or beneficiaries of the new laws. Sometimes the drafters have been assisted by an external expert presumed to be well versed in the material. Where that presumption is accurate, this does not guarantee an ability to adapt that expertise to the limitations and demands of an entirely different political, economic, and institutional context. In other cases, a small group of local jurists have drawn on their own experience and whatever knowledge they have of foreign models and doctrine. Although there is indisputably much relevant knowledge in the countries, it is not always vested in this group.[64]

Entrance into these new areas usually responds to demands from local partners in existing criminal justice programs. Anecdotal evidence supports their contention that current legislation is often inappropriate to contemporary needs, but hardly validates the proposed solution which closely resembles the manner in which the objected laws were produced. Latin America has a long

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consequent lack of attention to due process concerns.

[64]Bureaucratic turf wars sometimes influence the selection of drafters, pitting a Ministry of Justice or other entity with general responsibility for overseeing legislation against a ministry with more expertise in the subject matter. If the former wins, it may ensure more consistency with the format of other legislation but be out of touch with substantive policy.

history of modernizing legislation by imitating foreign examples with less than optimal results. If USAID's objective is an improved legal framework, this may not be a way to attain it. If it is to introduce more effective means for reaching that end, it has not succeeded there either. Equally anecdotal examples drawn from the few resulting draft laws indicate that this closed drafting process can result in unnecessary solutions for nonexistent problems, overt contradictions with other developmental policies,[65] and mechanisms whose cost and complexity may defeat their implementation. Even the rationale for choosing models is suspect; it is rarely if ever based on first-hand observation of its working in the country of origin, but rather on second or third-hand reports of its success or a simple desk analysis of its content.[66] As the cases are few and the amounts provided by USAID (or contemplated by other donors[67]) are small, the overriding concern is not the initial investment. It is instead the adequacy of the response and its potential for complicating rather than resolving the problems addressed. At the crux of the matter are the *quality* and *appropriateness* of the proposed legislative solution and the means through which an assistance program may promote both. While the goal is substantive, its solution is procedural. Code drive reforms can work, but this depends on how they, and not just their codes, are implemented.

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[65]In an era of market-based policies, where the emphasis has been on simplifying legislation and reducing regulation, it is disturbing that much of the code writing departs from a paternalistic notion of the state and the judiciary's role. If the judge's neutrality has been increased in the criminal jurisdiction, the intention has been the reverse in some of these other areas either by virtue of the substantive law to be a applied or the principles informing the procedural codes.

[66]Reports of success elsewhere are often grossly exaggerated. One drafter, considering the introduction of "boot-camp" programs for juveniles assured me of their success in the United States, a view hardly born out in a substantial body of empirical studies.

[67]The new IDB project in El Salvador has set aside a modest portion of its $23 million loan to finance drafting of administrative and commercial laws, and apparently will limit its support for reforms in these areas to drafting alone. In Ecuador, USAID's current $495,000 cooperative agreement with a local NGO finances drafting activities for several codes at roughly $50,000 each. USAID/Nicaragua's proposed project with the Court includes about $350,000 for drafting and discussions of a new Administrative Law.

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